91-520

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

VILLAGE OF PALESTINE and
PATRICK W. SIMMONS,

Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission, in evaluating an exemption request made under 49 U.S.C. 10505(a) from the provisions of 49 U.S.C. 11344(d) governing a proposed rail line transfer, properly excluded from consideration those aspects of the national rail transportation policy (49 U.S.C. 10101a) which do not deal directly with competition.

2. Whether employee concerns of 49 U.S.C. 10101(a)(12) in exemption proceedings involving 49 U.S.C. 11344(d), are addressed only by protective conditions required by 49 U.S.C. 11347.

LIST OF PARTIES

The following parties appeared in the proceedings before the Court of Appeals below:

Interstate Commerce Commission
United States of America
Indiana Rail Road Company
Illinois Central Railroad Company
Village of Palestine
City of Robinson
Willow Hill Grain, Inc.
Patrick W. Simmons (United transportation Union)

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Petitioners, Village of Palestine, and Patrick W. Simmons (Illinois Legislative Director for United Transportation Union), respectfully pray that a writ of certiorari issue to review the opinions and judgment of the United States Court of Appeals for the District of Columbia Circuit in this proceeding.

OPINIONS BELOW

The opinions of the court of appeals (App. A, 1a-23a), are reported at *Village of Palestine v. I.C.C.*, 936 F.2d 1335.

The final decision of the Interstate Commerce Commission (App. B, 24a-35a), is reported at *Indiana R. Co.-Acq. & Oper.-Illinois Central R. Co.*, 6 I.C.C.2d 1004. The initial decision

of the agency (App. C, 36a-85a), which was reversed by the final decision, is reported at *Indiana R. Co.-Acq. & Oper.-Illinois Central R. Co.*, 6 I.C.C.2d 969.

JURISDICTION

The opinions of the court of appeals (App. A, 1a-23a), along with the judgment, were entered June 28, 1991.

The jurisdiction of this Court is conferred by 28 U.S.C. 1254(a). *See also:* 28 U.S.C. 2101(c), 2350(a).

STATUTES INVOLVED

The principal statutory provisions are 49 U.S.C. 10101a, 10505(a), and 11344(d), and are set forth below:

TITLE 49, U.S.C.

§ 10101a. *Rail transportation policy.*

In regulating the railroad industry, it is the policy of **the United States Government—**

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

49 U.S.C. § 10505(a).

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commis-

> sion finds that the application of a provision of this subtitle—
>
> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

49 U.S.C. § 11344(d).

> (d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall approve such an application unless it finds that—
>
> (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and
>
> (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

STATEMENT OF THE CASE

1. Statutory Background

The sale of a rail line between rail carriers requires ICC approval under the standards of 49 U.S.C. 11344(d). The ICC must approve the line transfer unless it finds that the transaction will likely have an anticompetitive effect, and that the anticompetitive effects outweigh the public interest in meeting significant transportation needs. 49 U.S.C. 11344(d)(1) & (2). *People of State of Ill. v. ICC*, 687F.2d 1047, 1053 (7th Cir. 1982). In addition, the national Rail Transportation Policy (RTP), 49 U.S.C. 10101a, successor to the National Transportation Policy, governs the administration and enforcement of all provisions of the Interstate Commerce Act, *Schaffer Transp. Co. v. United States*, 355 U.S. 83, 87-88 (1957):

> "The National Transportation Policy, formulated by Congress, specifies in its terms that it is to govern the Commission in the administration and enforcement of all provisions of the Act, and this Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured."

The national RTP, which stands in the stead of the pre-1980 multi-modal transportation policy, contains 15 criteria to guide the ICC. These criteria deal with the national defense, § 10101a(4); energy conservation, § 10101a(15); health and safety, § 10101a(3), (8), (12); efficiency and sound economic conditions, § 10101a(3), (4), (5), (10); rate reasonableness, § 10101a(1), (6); competition, § 10101a(1), (4), (5), (13); cooperation with state agencies, § 10101a(9); fair wages and safe and suitable working conditions, § 10101a(12), among several other considerations.

There are statutory procedures to be followed in securing ICC approval for a line transfer under section 11344(d), such as giving various notices to public and Government agencies, together with various time frames governing the process. 49 U.S.C. 11345.

Congress in 1976, as amended in 1980, provided that the ICC must exempt a transaction otherwise subject to 49 U.S.C. 11344(d), if application of section 11344(d) is not necessary to carry out the national RTP and, either the transaction is "of limited scope," or the provisions of section 11344(d) are not necessary to protect shippers from an abuse of market power. 49 U.S.C. 10505(a). Thus, carriers believing their line transfer satisfies the RTP criteria and would be "limited in scope" or not constitute "market abuse," can seek an exemption pursuant to 49 U.S.C. 10505(a), rather than file an application for approval pursuant to 49 U.S.C. 11344(d).

Trackage rights between carriers are a different matter, for the ICC in 1985 issued a class exemption, under 49 U.S.C. 10505(a), exempting all trackage rights from the provisions of 49 U.S.C. 11343-47, subject to certain specified employee protective conditions, which are based on written agreements and not filed or sought in responsive applications in rail consolidation proceedings. A carrier merely files a "notice" at least 7 days in advance of the consummation date, and the trackage rights may be utilized. *Railroad Consolidation Procedures*, 1 I.C.C.2d 270 (1985), *aff'd Illinois Commerce Com'n v. ICC*, 819 F.2d 311 (D.C. Cir. 1987). Persons objecting to the trackage rights are relegated to the revocation process under 49 U.S.C. 10505(d). 1 I.C.C. 2d at 380-81. 819 F.2d at 315-17. 49 CFR 1180.2(d)(7); 1180.4(g).

2. Rulings Below

This case involves the extent to which the criteria of the national rail transportation policy (NTP), 49 U.S.C. 10101a, are required to be considered by the ICC when it exempts proposed transactions, pursuant to 49 U.S.C. 10505(a), from statutory provisions. The provisions involved in this case are the carrier consolidation provisions of 49 U.S.C. 11344(d), which pertain to transactions other than a merger or contol between two or more class I rail carriers.[1]

In this case, the ICC's Chief Administrative Law Judge (ALJ) denied an exemption for a 90.3-mile line transfer between two rail carriers, and revoked the class exemption trackage rights

[1]The opinion below is incorrect on the revenue requirements for various classes of rail carriers. 936 F.2d at 1137 n.2. (App. A, 3a n.2). A class I railroad has annual operating revenue in excess of $94.4 million; Class II is above $19.8 but less than Class I; and Class III is below $19.8 million. 49 CFR 1201, 1-1; 56 *Fed. Reg.* 20625-26 (May 6, 1991); 56 *Fed. Reg.* 46272-73 (Sept. 11, 1991).

previously noticed, on the ground the line transfer and trackage rights, although not anti-competitive, are contrary to the national RTP under the factual circumstances. 6 I.C.C.2d at 995. (App. C, 72a). The ICC reversed, stating the only criteria of the national RTP which are relevant are those dealing with the statutory provisions from which exemption is sought, such that the ALJ's finding on competition is dispositive of the RTP issue. 6 I.C.C.2d at 1008-9. (App. B, 30a-31a). The court of appeals affirmed the ICC's final decision. 936 F.2d 1335. (App. A, 1a-14a). Judge Silberman wrote a separate concurring opinion. 936 F.2d at 1342-46. (App. A, 15a-23a).

3. Opinions

Illinois Central Railroad Company (IC) and Indiana Rail Road Company (INRD)[2] sought ICC exemption under 49 U.S.C. 10505(a), from the prior approval requirements of 49 U.S.C. 11343, 11344(d), for the purchase by INRD of a 90.3-mile line between Sullivan, IN and Browns, IL, consisting of two connecting segments, one an east-west Sullivan/Newton track (46 miles), and the other a north-south Newton/Browns track (44.3 miles). In addition, INRD filed a notice of exemption, under the ICC's trackage rights class exemption, for the acquisition of trackage rights over IC's 5-mile line between Newton and Lis, and assignment of IC's trackage rights over the 11.1-mile line of a third rail carrier, Indiana Hi-Rail Corporation (IHRC), between Browns and Graywill, IL. Under

[2]A word about INRD, as it is a new carrier, whereas IC has a long history. INRD was formed in 1985, and its first acquisition was IC's line between Indianapolis and Sullivan the following year. 6 I.C.C.2d at 973. (App. C, 41a). *Cf. Black v. ICC*, 837 F.2d 1175 (D.C. Cir. 1988). In August, 1989, INRD acquired the Norfolk & Western Ry. Co. Line running north from Indianapolis to Tipton, IN. 6 I.C.C.2d at 973-74. (App. C, 41a). On August 28, 1991, INRD petitioned to abandon operations on the Tipton Line. ICC Docket No. AB-295 (Sub-No. IX), *Indiana Rail Road Company, Inc.—Discon. Exemption* (pending).

a settlement agreement between INRD and IHRC, the Newton/Browns segment after acquisition from IC, is to be resold by INRD to IHRC. 6 I.C.C.2d at 969-70 and 1005-6; 936 F.2d at 1337. (App. A, 4a-5a; App. B, 26a-27a; App. C, 36a-38a).

A. Initial ICC Decision

The ICC received some 53 comments either opposing or raising concerns about IC's sale of the rail lines and trackage rights. Those commenting included local and county governments, chambers of commerce, shippers, and railroad employees. The ICC held a public hearing in Illinois, at which 33 witnesses testified, and 11 others submitted written statements. 936 F.2d at 1137-38. (App. A, 5a).

The ICC's Chief Administrative Law Judge (ALJ) conducted the public hearings, and noted that there is substantial opposition to INRD's petition among shippers and community leaders, and also employee organizations. In general, those concerned with transfer of the Sullivan/Newton segment, which includes Village of Palestine, opposed the transfer. The support that did exist for the transfer generally was confined to the Newton/Browns segment:

> "INRD's petition and notice drew substantial opposition. There is shipper and community opposition, that of labor organizations, and others..." 6 I.C.C.2d at 970. (App. C, 37a).

> "In general, those concerned with the Sullivan/Newton segment were opposed to the sale." 6 I.C.C.2d at 972. (App. C, 40a).

> "It is clear that INRD lacks positive public support for replacing IC in the Robinson-Palestine area." 6 I.C.C.2d at 982. (App. C, 53a).

The ALJ made a series of findings concerning the efficiency and economy of railroad operations which would result from substitution of service from IC to INRD. These findings were devastating to INRD and supported local fears of loss of IC service:

> "INRD's interest is to serve only the Sullivan/Newton segment but will not add to the car supply and will operate older less powerful locomotives than IC." 6 I.C.C.2d at 974. (App. C, 42a).

> "As noted, the evidence in the record demonstrates that INRD proposes to purchase no additional cars, and presently operates no grain cars. It has added four locomotives to its systems, for a total of 13. Except for power units in need of repair, all presently are in operation and no additional units will be acquired for the proposed Sullivan-Newton-Lis operation of INRD." 6 I.C.C.2d at 976. (App. C, 45a).

> "Beyond its dubious operating plan, combining local traffic with a unit coal train to and from CIPS at Lis..." 6 I.C.C.2d at 977. (App. C., 46a).

> "INRD's attention to its power supply is said to be that from start-up in 1986 it has never failed to meet a service commitment or request because of insufficient power. No documentation of this claim is submitted, and in fact it has had five power failures, four of which occurred on coal movement to the CIPS plant at LIS while being operated by IC employees." 6 I.C.C.2d at 987. (App. C, 47a-48a).

> "INRD appears to be a highly leveraged financial structure. It will incur an additional $5 million in debt from this transaction and is not absolutely assured of the $1,000,000 on resale of the Browns line to IHRC. INRD has no visible car supply, and must

> secure cars from its connections, or force the shippers to find cars from some leasing agency. IC specifically has agreed to furnish equipment only to Marathon and Union Carbide. The only other car contract between IC and INRD provides for grain hopper cars on an availability basis." 6 I.C.C.2d at 986. (App. C, 58a-59a).

> "INRD has no experience with car supply for smaller shippers. IC certainly will prefer its own on-line shippers in the event of a car shortage. Moreover, those cars which are supplied by IC are to be routed loaded via IC, and not necessarily to CSX, IHRC, Conrail or NS all of which connect with INRD." 6 I.C.C.2d at 986. (App. C, 59a).

> "Protestants note that IC has superior locomotives, cars, and other equipment, and has better maintenance capabilities. IC is said to have car supply, whereas INRD has no car supply. Also, protestants say that the present manner of handling coal traffic into CIPS at Lis with an IC and INRD interchange at Palestine is very efficient, and that it would be less efficient for both IC and INRD to operate into and out of Lis." 6 I.C.C.2d at 988. (App. C, 61a).

The ALJ in his final conclusion, found the Sullivan/Newton line to be a sound line, and better operated by IC than by INRD, and found no real benefit other than employee removal.

> "The Sullivan-Newton line is not failing. Instead it is a sound line better operated by IC than by INRD, with no real acquisition purpose other than mass employee removal in violation of the NTP. 6 I.C.C.2d at 995. (App. C, 71a).

The ALJ found that the transaction was not "limited in scope," but this was immaterial since the alternative statutory

"market abuse" was not present. 6 I.C.C.2d at 988-89, 993, 995. (App. C, 62a, 68a, 71a).

The ALJ stated that the national RTP applies in both applications cases under 49 U.S.C. 11344(d), and in exemption cases brought under 49 U.S.C. 10505(a) for relief from 49 U.S.C. 11344(d). 6 I.C.C.2d at 994 (App. C, 70a):

> "Because the NTP is not mentioned at all in the case of a more formal section 11344(d) proceeding, argument can be made that the exemption process should be no more difficult than the regular non-exempt application process under section 11344(d) and that, therefore, little or only passing attention need be given to the NTP in an exemption case. In my opinion, the reverse is true. The regular application process should consider the NTP as should the exemption process. Indeed, any section 11344(d) application which transgresses the NTP should be denied even though the statute is technically satisfied."

The ALJ denied the petition for exemption, and revoked the ancillary trackage rights class exemption, for breach of the RTP. He found the sale would not further fair working conditions and that the line would be better operated by IC than by INRD. Although he did not specifically cite the RTP criteria, these would be the fair working conditions, section 10101a(12), and the efficiency goals, section 10101a(3), (4), (5), and (10).[3]

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[3]The ALJ recognized that certain ICC staff members were of a different view on the law, and he attached their memoranum to his decision. 6 I.C.C.2d at 996-1003. (App. C, 73a-85a).

B. Final ICC Decision

The ICC reversed the initial decision. The agency's action focused on the statutory provisions from which exemption is desired — subsection 11344(d) — and ruled that the inquiry ended if the line transfer is not anticompetitive under subsection 11344(d)(1). The ICC said Congress has limited the ICC's jurisdiction under section 11344 to whether the transaction would have a substantial competitive impact; accordingly, the ICC ruled that its analysis in an exemption context need not be broadened beyond those aspects of the RTP that deal with competition. The ICC concluded that the ALJ's finding that the transaction will have no anticompetitive effects is dispositive of RTP issues. 6 I.C.C.2d at 1007-10. (App. C, 27a-31a).

The ICC ruled that section 11344(d) does not include the effects on employees as a decisional criterion, as these effects are addressed only by section 11347. The ICC added that the fair wages and safe and suitable working conditions of 49 U.S.C. 10101a(12) is satisfied by the standard employee protective conditions. 6 I.C.C.2d 1009-10. (App. C, 31a).

Finally, the ICC reversed the ALJ's "not limited scope," finding and his decision to revoke the trackage rights exemption, while affirming his negative finding on "market abuse." 6 I.C.C. 2d at 1010-12. (App. C, 31a-33a).

C. Court of Appeals' Opinion

The Court of Appeals denied Village of Palestine's petition for review of the ICC's final decision. The panel reasoned that if a statutory provision, i.e., 49 U.S.C. 11344(d), does not implement a particular goal set forth in the rail transportation policy, it follows in the language of section 10505(a) that application of the provision is not necessary to carry out that

goal. The court's opinion said the scope of the ICC's review in an exemption proceeding will be a function of the relationship between the statutory provision from which exemption is sought and the national RTP, citing *Brae Corp. v. United States*, 740 F.2d 1023. 936 F.2d at 1338-39 (App. A, 7a):

> "The scope of the Commission's review in an exemption proceeding will therefore be a function of the 'relationship between" the 'section' from which an exemption is sought and 'the national rail transportation policy... *Brae Corp. v. United States*, 740 F.2d 1023, 1046-47 (D.C. Cir. 1984), *cert. denied*, 479 U.S. 1069 (1985)."

The panel distinguished *Illinois Commerce Com'n v. ICC*, 787 F.2d 616 (D.C. Cir. 1986), which reviewed the ICC's out-of-service abandonment class exemption, and had faulted the ICC for not rendering a number of findings under the RTP. The panel noted that an abandonment proceeding under 49 U.S.C. 10903-5 is subject to a "public convenience and necessity" standard, which impacts many of the RTP criteria. On the other hand, section 11344(d) is limited to the goal of ensuring effective competition, which impacts fewer RTP criteria. 936 F.2d at 1138-39. (App. A, 7a-9a).

The court of appeals said that if the ICC were to make findings about each aspect of the RTP possibly affected by the sale, the exemption process would be broader than under a formal application proceeding. 936 F.2d at 1339. (App. A, 9a).

The reviewing court contended that there has been no unexplained departure from ICC practice, citing recent agency decision (all of which, but one, were subsequent to the ICC's action here), and that there did not appear to be opposition in previous exemption cases. 936 F.2d at 1339-41. (App. A, 9a-12a).

Judge Silberman issued a concurring opinion, of about the same length as the court's opinion. 936 F.2d at 1342-46. (App. A, 15a-23a). He would have the ICC's interpretation categorized under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984) as one of a permissible interpretation, thus allowing the agency to adopt a more pro-regulatory interpretation in the future. The concurring opinion focused on certain language in the ICC's final decision where the agency said its analysis ***need not*** be broadened beyond consideration of those aspects of the RTP dealing with competition, and that it ***need not*** look at RTP issues unrelated to the purpose of section 11344. 936 F.2d at 1343 (App. A, 17a-18a).

The concurring opinion would leave the ICC's interpretation — that the ICC's reach under the exemption tracks that of the statutory provision from which exemption is sought — open to reconsideration in the future. *(Ibid.)*

The concurring opinion disagreed with the majority's approach to the "fair wages and suitable working conditions" of section 10101a(12), saying that section 10101a(12) is just as relevant as the competitive criteria of sections 10101a(4), (5), and (13) dealing with competition, since 49 U.S.C 11347 makes reference to 49 U.S.C. 11344. 936 F.2d at 11344-45 (App. A, 21a-22a).

REASONS FOR GRANTING THE WRIT

This case is of exceptional importance. The ICC, and the court of appeals, have limited the application of the national rail transportation policy (RTP), so that only those criteria of the RTP need be considered which relate to the underlying statutory provisions for which exemption is requested under 49 U.S.C. 10505(a).

The ICC has now moved rapidly to extend the limited RTP

analysis from the exemption process under 49 U.S.C 10505(a), to the ***revocation*** process under 49 U.S.C. 10505(d), based upon the court of appeals' ruling and citing its opinion. *Minnesota Comm. Ry., Inc. Trackage Exempt.-BN RR. Co.*, 8 I.C.C.2d 31, 35-37 (1991).

In a recent announcement, the ICC stated that the principle announced in *Village of Palestine* would now be applicable to *all* rail exemption proceedings, not just those dealing with 49 U.S.C. 11344. *Rail Exemption Procedures*, 8 I.C.C.2d 114, 116 (1991).

The ICC, and the reviewing court, have decided a federal question (National RTP) in a way which conflicts with the decisions of this Court on the National Transportation Policy.

I. THE FULL REACH OF THE NATIONAL RAIL TRANSPORTATION POLICY EXTENDS TO ALL PROVISIONS OF THE INTERSTATE COMMERCE ACT.

The ICC erroneously ruled, and the court of appeals affirmed, that Congress has limited the ICC's *jurisdiction* under 49 U.SC. 11344 to competitive considerations, so that the agency's consideration in the exemption context need not be broadened beyond those aspects of the RTP dealing with competition. 6 I.C.C.2d at 1007. (App. B, 27-28a). 936 F.2d at 1343. (App. A, 17a-18a).

It is too late in the day to argue that the full reach of the RTP does not apply to *all* rail provisions of the Interstate Commerce Act. The ICC does possess ***jurisdiction*** to apply the full reach of the RTP to all statutory provisions, even if the statutory provision does not deal with the subject specified in the RTP. For example, with respect to the national defense criterion, now 49 U.S.C. 10101a(4), this Court stated, "Con-

gress unequivocally reserved to the Commission power to regulate reasonableness of interstate rates in light of the needs of the national defense." *United States v. Capital Transit Co.*, 325 U.S. 357 (1945).

The RTP is the "yardstick" by which the correctness of the ICC's decision should be measured. *Schaeffer Transp. Co. v. United States*, 355 U.S. 83, 78-88 (1957). The ***requirement*** that the ICC consider all aspects of the RTP where, as here, the exemption statute, 49 U.S.C. 10505(a), specifically mentions the RTP, gives emphasis to the need to consider all facets of the RTP. A somewhat similar situation arose when Congress in 1958 amended the former section 15a dealing with carrier ratemaking, to include specific reference to the national transportation policy. This Court held that such vital considerations as national defense are not "mere window dressing, without any practical significance in terms of the Commission's functions." *I.C.C. v. New York, N.H. & H.R. Co.*, 372 U.S. 744, 761-62 (1963).

This Court reiterated that the NTP is the "yardstick" for the ICC in ***American Trucking*** *v. A.,T. & S.F. R. Co.*, 387 U.S. 397, 421 (1967), and the Court said a claim of violation of the NTP must be specifically considered by the ICC in *Mechling Barge Lines v. U.S.*, 376 U.S. 375, 388 (1964).

The opinions of this Court clearly establish that Administrative Law Judge Cross correctly ruled that the ICC ***must*** give specific consideration to the RTP in an exemption proceeding under 11344(d). 6 I.C.C.2d at 994. (App. C, 70a). The efficient and economical operation of the Sullivan/Newton line, and employee concerns, are proper RTP matters for consideration in appropriate circumstances.

A. 1980 Amendment.

Congress in 1980 split the national transportation policy into rail and non-rail components, with the rail criteria set forth in 49 U.S.C. 10101a, following the non-rail 49 U.S.C. 10101. The resultant RTP is "to guide the Commission in regulation of the railroad industy." H. Rept. (Conf.) 96-1430, p. 80 (1980). To be sure, the Congress in 1980 desired to emphasize competition for the rail industry, but such did not exclude non-competition features of the RTP. Congress stated the purpose of the Staggers Act was to reform regulatory policy *so as to preserve a safe, adequate, economical, efficient, and financially stable* rail system. 49 U.S.C. 10101a (note). P.L. 96-448, Section 3. 94 Stat. 1897 (1980).

The present RTP stands in the stead of the pre-1980 NTP, and serves the same guide. *Chesapeake and Ohio Ry. Co. v. United States*, 704 F.2d 373, 376 (7th Cir. 1983). The importance of the RTP is confirmed by the fact of its reference in the non-rail NTP. *ICC v. Texas*, 479 U.S. 450, 460-61 (1987).

B. Opinion in Brae Corp.

The court of appeals relied upon the opinion in *Brae Corp. v. United States*, 740 F.2d 1023, 1046-47 (D.C. Cir. 1984), *cert. den.* 479 U.S. 1069,[4] for the view that the scope of the ICC's review in an exemption proceeding will be a function of the "relationship between" the "section" from which an exemption is sought and the "national rail transportation policy." 936 F.2d at 1338-39. (App. A, 7a).

The court of appeals misreads the *Brae Corp.* opinion, for that panel did not mean to limit consideration of RTP factors to those expressed in the provisions to be exempted; on the

[4]Justices White and Rehnquist dissenting.

contrary, the panel in *Brae Corp.* thought the ICC had not correctly considered the RTP. This is apparent from a full reading of the excerpt, 740 F.2d at 1046-47:

> "At least in this case we believe that the Commission must consider the relationship between section 10705a and the national transportation policy as well as the exemption provision invoked here. Such consideration is mandated by the Staggers Act itself which requires the ICC to consider whether regulation is needed to further the transportation policy set out in the Act."

Other opinions in the courts of appeals dealing with the ICC exemption power have indicated that the full reach of the RTP criteria is applicable to ICC exemption decisions, without exclusion. *See: United Transp. Union v. ICC*, 891 F.2d 908, 910-11 (D.C. Cir. 1989), *cert. den.* 110 S.Ct. 3271, reviewing *Exemption — Certain Interlocking Directorates*, 5 I.C.C.2d 7 (1988); *Illinois Commerce Com'n v. ICC*, 819 F.2d 311 (D.C. Cir. 1987), reviewing *Railroad Consolidation Procedures*, 1 I.C.C.2d 270 (1985); *Coal Exporters Ass'n of U.S. v. United States*, 745 F.2d 76 (D.C. Cir. 1984), *cert. den.* 741 U.S. 1072, reviewing *Export Exemption-Export Coal*, 367 I.C.C. 570 (1983); and *Illinois Commerce Com'n v. ICC*, 787 F.2d 616 (D.C. Cir. 1986), reviewing *Exemption of Out of Service Rail Lines*, 366 I.C.C 885 (1983).

C. Chevron Analysis

The concurring opinion below incorrectly suggests this case is an application of *Chevron USA Inc. v. NRDC*, 467 U.S. 837 (1984). 936 at 1342-46. (App. A, 15a-23a). At no place does the ICC mention *Chevron* or any other case claiming agency interpretation. Rather, the ICC believes it is limited by jurisdiction conferred by Congress, and that Congress has so spoken, despite decisions of this Court. 6 I.C.C.2d at 1007. (App. B, 27a-28a).

Of course, settled decisions of this Court are to the contrary. The RTP is the guide to the ICC's administration of rail provisions.

II. THE GOALS OF 49 U.S.C. 10101a(12) ARE NOT ADDRESSED ONLY THROUGH ICC CONDITIONS REQUIRED BY 49 U.S.C. 11347.

The ICC ruled that the "fair wages and safe and suitable working conditions" proviso of the RTP, section 10101a(12) is satisfied by the imposition of employee protective conditions required by 49 U.S.C. 11347. 6 I.C.C. 2d at 1009-10. (App. B, 31a). The court of appeals indicated confusion on the interplay, if any, between sections 10101a(12), 11344, 11347, and ICC conditions, as emphasized by the concurring opinion. 936 F.2d at 1338 n.3, 1339 n.4, 1344-45. (App. A, 6a n.3, 8a n.4, 20a-22a).

The ICC and court of appeals err. The RTP's employee criterion has an independent basis apart from 11344, 11347, and agency conditions. Fair wages do not relate only to IC employees during a 6-year protective period, but also to INRD low-wage employees, and the impact of IC's withdrawal from the Palestine-Robinson area upon the local economy. The substitution of lower income INRD payrolls was a consideration of a number of public and business witnesses. Some of this testimony is summarized in the initial decision. 6 I.C.C.2d at 979-82 (App. C, 49a-53a).

There is a similar community concern for railroad safety, and suitable working conditions. The employee criterion of the RTP has a broader role than merely ensuring that IC employees receive an income guarantee for a certain period.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinions and judgment of the United States Court of Appeals in this case.

Respectfully submitted,

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September 26, 1991

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 21, 1991 Decided June 28, 1991

No. 90-1418

VILLAGE OF PALESTINE, CITY OF ROBINSON, WILLOW HILL GRAIN, INC., AND PATRICK W. SIMMONS,
PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

INDIANA RAIL ROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY,
INTERVENORS

Petition for Review of an Order of the Interstate Commerce Commission

---

Gordon P. MacDougall and *Frank J. Weber* for petitioners.

Laurence H. Schecker, Attorney, Interstate Commerce Commission, with whom *Robert S. Burk,* General Counsel,

Henri F. Rush, Deputy General Counsel, Interstate Commerce Commission, *James F. Rill,* Assistant Attorney General, *John J. Powers, III,* and *John P. Fonte,* Attorneys, Department of Justice, were on the brief, for respondents.

John H. Broadley entered an appearance for intervenor, Indiana Rail Road Company.

Robert H. Wheeler entered an appearance for intervenor, Illinois Central Railroad Company.

Before: SILBERMAN, WILLIAMS, and RANDOLPH, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

Concurring opinion filed by *Circuit Judge* SILBERMAN.

RANDOLPH, *Circuit Judge*: The Village of Palestine and others petition for review of an order of the Interstate Commerce Commission exempting a sale of rail lines and trackage rights from 49 U.S.C. §§ 11343 and 11344(d).[1]

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[1]In relevant part, section 11343 sets forth the types of transactions that may be subject to Commission regulation:

> (a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission . . . may be carried out only with the approval and authorization of the Commission:
>
> . . . .
>
> (2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.
>
> . . . .
>
> (6) acquisition by a rail carrier of trackage rights over . . . a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

Section 11344(d) provides the standards by which transactions set forth in section 11343 are to be judged:

> In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall approve such an application unless it finds that —

The dispute centers on the meaning of 49 U.S.C. § 10505(a), the provision authorizing the Commission to exempt transactions, and the extent to which this provision requires the Commission to evaluate each of the legislative goals collectively designated the "rail transportation policy" (49 U.S.C. § 10101a). Petitioners also challenge the Commission's factual findings made in support of the exemption.

I

The sale of a rail line or trackage rights between a class I rail carrier and a class II or class III rail carrier normally requires Commission approval after a full-blown proceeding. *See* 49 U.S.C. §§ 11343(a)(2) & (6), 11344(d), 11345.[2] The parties to the sale file an application and the Commission publishes a notice of the transaction in the Federal Register. *Id.* § 11345(a). The public may comment on the application for 30 days after publication of the notice. *Id.* After reviewing the public's comments, the Attorney General and the Secretary of Transportation may choose to intervene as parties to the proceeding. *Id.* § 11345(c)(1). The Commission may order public hearings or require written submissions from the parties. 49 C.F.R. § 1180.4(e). The parties have between 105 days and 24

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(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

[2]The ICC has classified rail carriers based on their annual operating revenues. 49 C.F.R. § 1207.1(1). Class I carriers have annual operating revenues of $5 million or more. Class II carriers have annual operating revenues of at least $1 million but less than $5 million. Class III carriers have operating revenues of less than $1 million. Indiana Rail Road (the purchaser) is a class III carrier and Illinois Central (the seller) is a class I carrier.

months to complete this evidentiary process, depending on how the rail carriers involved in the sale are classified. *Id.*

Based on the evidence received, the Commission must approve the sale unless it finds that the transaction will likely have an anticompetitive effect. 49 U.S.C. § 11344(d)(1). If the Commission so finds, it still must approve the sale unless "the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs." *Id.* § 11344(d)(2); *see Illinois v. ICC*, 687 F.2d 1047, 1053 (7th Cir. 1982).

The Commission must exempt a transaction otherwise subject to full procedural review under sections 11343 and 11344(d) if two conditions are satisfied. 49 U.S.C. § 10505(a). The first condition is that application of sections 11343 and 11344(d) is not necessary to carry out the "rail transportation policy" of 49 U.S.C. § 10101a, which is reproduced fully in the appendix to this opinion. 49 U.S.C. § 10505(a)(1). The second is that the sale "is of limited scope," or application of sections 11343 and 11344(d) is not "needed to protect shippers from the abuse of market power." 49 U.S.C. § 10505(a)(2). Obtaining an exemption streamlines the regulatory process by eliminating notice and comment in some cases, by making a hearing unnecessary, and by expediting the final decision. *See* 45 Fed. Reg. 85,180-81 (1980).

This case concerns a petition filed by Indiana Rail Road and Illinois Central on September 28, 1989, for an exemption from sections 11343 and 11344(d). Subject to Commission approval, Illinois Central agreed to sell 90.3 miles of track to Indiana Rail Road. The rail lines are in two segments, one running from Sullivan, Indiana, to Newton, Illinois, the other from Newton to Browns, Illinois. Illinois Central also agreed to sell 16.2 miles of trackage rights along connecting lines. In a separate agreement not at issue here, and subject to Commission approval, Indiana Rail Road agreed to resell the Newton-Browns segment of the line to Garden Spot, a limited partner of Indiana Hi-

Rail Corporation. So that Indiana Hi-Rail could operate pending Commission approval of the resale, it negotiated an interim agreement with Indiana Rail Road for assignment of trackage rights over the Newton-Browns segment. With respect to the assignment, Hi-Rail obtained another Commission exemption, the validity of which is not at issue here.

The Commission received 53 comments either opposing or raising concerns about Illinois Central's sale of the rail lines and trackage rights. Many of the commenters, including local and county governments, chambers of commerce, affected railroad employees, and railroad employee organizations, requested a local hearing. While not required to do so, the Commission assigned the exemption petition to an administrative law judge for hearing. The hearing occurred in Robinson, Illinois, on May 2, 1990; 33 witnesses testified and 11 others submitted written statements. The testimony opposing the transaction focused on Indiana Rail Road's ability to supply sufficient services, the elimination of 19 local railroad jobs, the considerable reduction in pay for those railroad employees who choose to continue working on the rail line under Indiana Rail Road's management, and the impact of a financially unstable railroad on the local economy.

The administrative law judge found, and the Commission later agreed, that the sale would not result in an abuse of market power. 49 U.S.C. § 10505(a)(2)(B). Indiana Rail Road would transport a variety of goods, provide an adequate supply of rail cars for grain shippers, and maintain neutral access to several railroads offering long-haul transportation services. The administrative law judge also found that the transaction would foster rather than hamper competition, one of the central objectives of the rail transportation policy (49 U.S.C. § 10101a(1), (4), (5), & (13)) and section 11344(d). The Commission adopted this finding as well. The administrative law judge decided, however, that exempting the sale from application of sections 11343 and 11344(d) would be inconsistent with other goals stated in the rail transportation policy.

He found that the sale would not further fair working conditions (49 U.S.C. § 10101a(12)) and, citing no particular subsection of the policy, that Illinois Central could operate the line better than Indiana Rail Road. On that score, the Commission reversed. It held that the administrative law judge's finding of no anticompetitive effect was enough to satisfy the rail transportation policy in this case.[3]

II

The principal issue concerns the meaning of section 10505(a)'s command that "the Commission shall exempt . . . a transaction . . . when the Commission finds that the application of a provision of this subtitle — (1) is not necessary to carry out the transportation policy of section 10101a of this title . . .." Petitioners misread this language. They say it requires the Commission, in order to grant an exemption, to review the fifteen subsections in section 10101a, determine which might be implicated by the transaction, and make findings that the transaction is consistent with each. But section 10505(a)(1) does not ask whether the "transaction" implements the rail transportation policy. It focuses, as one might expect in a statute aimed at deregulation (*CMC Real Estate Corp. v. ICC*, 807 F.2d 1025, 1031 (D.C. Cir. 1986); *see also Central States Motor Freight Bureau, Inc. v. ICC*, 924 F.2d 1099, 1100-01 (D.C. Cir. 1991)), on the need for regulation.

Not every provision of the Interstate Commerce Act regulating railroads and the Staggers Rail Act (Pub. L. No. 96-488, 95 Stat. 1895 (1980)) implements each one of section 10101a's many goals. That would be a legislative impossibility. Different means must be employed to accomplish different ends. Section 10505(a)(1) simply assumes that the "provision of this subtitle," whichever it

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[3]While the Commission therefore refused to consider the sale's impact on labor in deciding whether to grant an exemption, it required Illinois Central and Indiana Rail Road to comply with the employee protective conditions set forth in *New York Dock Railway*, 360 I.C.C. 60 (1979).

may be, carries out at least some portion of section 10101a's rail transportation policy. Since a section 10505(a) exemption may be granted only from "a provision of this subtitle," rather than from the statute as a whole, *see Illinois Commerce Comm'n v. ICC*, 787 F.2d 616, 627 (D.C. Cir. 1986), one must first decide in what respect the "provision" implements the rail transportation policy. Only then can it be determined whether application of the provision is "necessary" to carry out that aspect of the policy in a particular case. Put differently, if a provision does not implement a particular goal set forth in the rail transportation policy, it follows in the language of section 10505(a) that application of the provision is not necessary to carry out that goal. The scope of the Commission's review in an exemption proceeding will therefore be a function of the "relationship between" the "section" from which an exemption is sought and "the national rail transportation policy ...." *Brae Corp. v. United States*, 740 F.2d 1023, 1046-47 (D.C. Cir. 1984), *cert. denied*, 479 U.S. 1069 (1985).

Although petitioners believe that *Illinois Commerce Commission*, 787 F.2d at 630-31, supports them, it is far from clear why. The Commission there had granted an exemption from the abandonment provisions (49 U.S.C. §§ 10903, 10904, 10905) for out-of-service rail lines. Without an exemption, a railroad could abandon a line only if the Commission found that this would serve the "public convenience and necessity." 787 F.2d at 621. Many aspects of the rail transportation policy would seem to be carried out by requiring that an abandonment serve the "public convenience and necessity." The court therefore had no occasion to decide whether section 10505(a) required the Commission to consider portions of the rail transportation in addition to those implemented by the abandonment provisions. The court did say, however, that only "relevant" or "pertinent" portions of section 10101a's rail transportation policy had to be evaluated (787 F.2d at 629, 630 n.100, 632), and in a footnote explained that under section 10505(a) the Commission was bound to

"study ... the relationship between the statutory provisions ordinarily applicable and the relevant facets of [the rail transportation] policy." 787 F.2d at 630 n.100. The quoted language is entirely consistent with the Commission's ruling in this case.

Under section 11344(d)(1), the Commission would have been required to approve the sale of these rail lines and trackage rights if there would have been no anticompetitive effect. *Illinois v. ICC*, 687 F.2d 1047, 1053 (7th Cir. 1982). The Commission determined, and petitioners do not dispute, that section 11344(d) promoted the goal, stated several times in the rail transportation policy, of ensuring effective competition among rail carriers and other modes of transportation. *See* 49 U.S.C. § 10101a(1), (4), (5) & (13). Accordingly the Commission examined the impact of the proposed sale on competition and, finding no anticompetitive effect, granted the exemption. It considered whether the purchaser would operate an efficient and financially viable railroad only insofar as this affected the purchaser's ability to compete effectively. Over petitioners' objection, it did not consider the effect of the sale on labor to be pertinent to its granting of an exemption from section 11344(d).[4]

If, as petitioners urged, the Commission had made find-

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[4]The Commission put it this way: "Section 10505 provides a shortcut analysis to see if regulation — in this case under section 11344(d) — is necessary. If section 11344(d) does not require review of particular issues, neither does the section 10505 process.... [S]ection 11344(d) does not include the effects on employees as a decisional criteria.... (Rather, for section 11344(d) transactions, such concerns are addressed only through the protective conditions required by section 11347.)." Finance Docket Nos. 31472 & 31485, *Indiana Rail Road Co.—Petition for Exemption—Illinois Central Railroad Co.*, served Aug. 7, 1990, slip op. at 3, 5.

The railroads here did not seek an exemption from § 11347 and the Commission determined that the employees were protected "by the imposition of the standard labor protective provisions." Slip op. at 6.

ings about each aspect of the rail transportation policy possibly affected by the sale,[5] the exemption process would have been broader and possibly more onerous than the proceeding from which exemption was sought. Indiana Rail Road could have obtained approval of the sale under section 11344(d)(1) by demonstrating only the absence of anticompetitive effect. The Commission properly rejected petitioners' argument that to obtain an exemption from that provision, Indiana Rail Road also had to establish that the transaction would "encourage fair wages," 49 U.S.C. § 10101a(12), a goal Congress in section 11344(d)(1) did not deem pertinent in regulating the sale of rail lines or trackage rights.

Citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), petitioners charge that the Commission's interpretation is an unexplained departure from its practice. The Commission's decisions suggest the opposite. Whenever the Commission has considered *how* to decide whether "application of a provision of this subtitle is necessary to carry out the rail transportation policy," it has adopted the same approach as here.[6]

Petitioners cite no cases in which the Commission has denied an exemption based on some goal of the rail transportation policy not carried out by the statutory provision from which the exemption was sought. Instead, they point

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[5]Section 10505(a) does not say that the Commission may merely consider or contemplate or study the rail transportation policy; the Commission is required to grant an exemption only when it "finds" that application of the provision from which exemption is sought is not necessary.

[6]Finance Docket No. 31643, *United Transp. Union v. Southern Pacific Transp. Co.* (unpublished), served Nov. 5, 1990, slip op. at 5; Finance Docket No. 31610, *Chicago West Pullman Corp.—Control Exemption—Iowa Interstate R.R. Ltd.* (unpublished), served Oct. 30, 1990, slip op. at 3; *Blackstone Capital Partners, L.P.—Control Exemption—CNW Corp.*, 5 I.C.C. 1015, 1019 (1989), *aff'd sub nom. Brotherhood of Railway Carmen v. ICC*, 917 F.2d 1136 (8th Cir. 1990).

to decisions in which the Commission explained its grant of an exemption in the following terms or something similar: "an exemption will expedite regulatory decisions and reduce regulatory barriers to entry [49 U.S.C. § 10101a(2) & (7)]; and foster sound economic conditions and encourage efficient management [49 U.S.C. § 10101a(5) and (10)]. Other aspects of the rail transportation policy are not affected adversely."[7] Such statements suggest that the Commission looked at each aspect of section 10101a, but we do not believe they represent any settled practice on the Commission's part. From all that appears, the exemptions were granted in these cases without opposition; no issue regarding the proper interpretation of section 10505(a) was raised or discussed; and the transactions seemed to be inconsequential. The Commission's general observations about the rail transportation policy did not purport to reflect any considered course of decisionmaking and we will not treat them as such, particularly since the Commission, when directly confronted with the issue presented here, resolved it in a manner consistent with its decision in this proceeding.

While we therefore conclude that the Commission properly interpreted section 10505(a), the question remains whether the Commission's finding that the sale would not have an anticompetitive effect should be upheld. Petitioners' argument before the Commission was that the transaction would result in certain restrictions and surcharges on the shipment of goods that "do not allow, to the maximum extent possible, competition and demand for services to set reasonable rates." *See* 49 U.S.C. § 10101a(1). The Commission found otherwise and its conclusion is amply supported by the evidence. *Consolidated Edison Co. v.*

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[7] *See, e.g.*, Finance Docket No. 31356, *Kansas City Southern Ry. —Control Exemption—Joplin Union Depot Co.* (unpublished), served Feb. 6, 1989; Finance Docket No. 31280, *Norfolk & Western Ry.—Control Exemption—Des Moines Union Ry.* (unpublished), served Sept. 12, 1988; Finance Docket No. 31264, *KKR Associates—Control Exemption—Brockway Realty Corp.* (unpublished), served July 26, 1986.

NLRB, 305 U.S. 197, 229 (1938). The Commission adopted the detailed factual findings of the administrative law judge, who carefully considered the evidence and found that grain shippers would have more transportation options after the sale while other shippers would be unaffected by the transaction.

III

Petitioners also challenge the Commission's findings that the sale is "of limited scope" and that application of section 11344(d) is "not needed to protect shippers from the abuse of market power." Under section 10505(a)(2) only one of these conditions must be established to obtain an exemption. We agree with the Commission that both are present in this case.

As to the limited scope finding, petitioners contend that "[d]istance alone cannot be the sole guide." Perhaps so, but distance was not the Commission's only guide. While the Commission relied on the relatively short length of track subject to sale, which is surely important, the Commission added that the transaction was to be consummated without the issuance of new securities or the restructuring of rail operations, either of which presumably would broaden its scope.

In regard to the issue of market abuse, petitioners misunderstand the basis for the Commission's decision. Believing that the administrative law judge's finding of no market abuse was based on the contemplated resale of part of the rail line to Indiana Hi-Rail, they complain about the Commission's treatment of resale as an unrelated matter subject to future review. The Commission's finding, however, rests on a different basis. Relying on the testimony of Thomas Hoback, president of Indiana Rail Road, the Commission found that Indiana Rail Road could interchange traffic with six long-haul carriers, thereby providing rail access to new markets, and would furnish an adequate supply of rail cars. Petitioners raise no bottleneck claim, and indeed no reason appears why any bot-

tleneck problems on the line would be aggravated by the change in ownership. The Commission therefore properly found no reason to doubt Indiana Rail Road's assurance that it would be responsive to the shippers' needs on the newly-acquired lines.

The Commission correctly interpreted section 10505(a). Its findings are supported by substantial evidence. The petition for review is therefore denied.

APPENDIX

Title 49 U.S.C. § 10101a. *Rail transportation policy.*

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of non-compensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

SILBERMAN, *Circuit Judge, concurring*: The majority opinion is quite ambiguous as to whether the Commission's interpretation of the statute is affirmed because it is a permissible construction or because it is the only acceptable construction. The majority does not even mention *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the governing Supreme Court case dictating the manner in which the judiciary must review agency construction of their authorizing legislation. I write separately, then, to explain why the majority opinion must not, indeed could not, be interpreted as *holding* more than that the Commission's interpretation is a permissible one. The Commission should not be barred in the future from adopting another, more pro-regulatory, interpretation of the ICC's exemption authority, perhaps more sympathetic to the interest of affected workers.

The key provision in dispute is § 10505.

> (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—
>
> > (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
> >
> > (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

49 U.S.C. § 10505(a)

This provision, by using the word "shall," imposes an obligation on the Commission to provide the exemption if the requisite criteria are met. But at least on its face subsection (1) leaves the Commission with a broad discretion to determine whether an application of a provision is necessary to carry out "the Railroad Transportation Policy"

(RTP), which is a "wish list" of imprecisely drafted, overlapping, and somewhat contradictory policy goals. The language of § 10505(a) does not even purport to limit the Commission as to which of these 15 goals is to be considered when the Commission decides whether to grant an exemption from the requirements of a particular section of the statute. We have previously said that the Commission need not "address each and every one of the policy's fifteen components, for some *may be completely unrelated* to the exemption. It does mean, however, that the Commission must consider all aspects of the policy *bearing* on the propriety of the exemption," *Illinois Commerce Comm'n v. ICC*, 787 F.2d 616, 627 (D.C. Cir. 1986) (emphasis added; footnotes omitted). In that case we reversed and remanded the ICC's rules expediting abandonment proceedings for failure to consider several RTP factors the court thought "relevant" to the exemption. *Id.* at 632. We did not suggest that RTP factors were relevant in an exemption determination only if they were directly and specifically implicated in the underlying regulatory provision. Indeed, the tone, if not the holding of our opinion, as the language quoted above indicates, suggests that the Commission should be inclusive rather than exclusive in determining RTP factors to be considered in exemption determinations—which is, of course, why petitioners rely so heavily on that opinion. In our case, however, the Commission in granting the exemption declined to consider any RTP factor that it thought was *not* subsumed or directly implicated in the underlying substantive provision, § 11344 from which the exemption was sought.

That provision reads as follows:

> (d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall approve such an application unless it finds that—
>
> > (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface

> transportation in any region of the United States; and
>
> (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

49 U.S.C. § 11344(d)

Petitioners argued that the Commission cannot properly limit its scope of inquiry or consideration of RTP factors to ask only whether the proposed exemption would serve competition—and particularly that the Commission should consider RTP factor (12) instructing the Commission "to encourage fair wages and safe and suitable working conditions in the railroad industry."

The ALJ did just as petitioners asked. He believed that the Commission can deny the exemption because of "one factor, for example, the effect on working conditions" and recommended the denial because: "I believe that the Commission should conclude that the subject transaction has no substantial purpose other than employee removal and deny the application on the basis of a breach of the [RTP]." *ALJ Initial Decision* (ALJ I.D.) at 20. The ALJ was obviously referring to § 10101a(12).[1] The ICC reversed, but it is extremely important to note carefully what the Commission said and did not say. The Commission reasoned that:

> Under section 11344, Congress has limited the Commission's jurisdiction to consideration of whether a transaction would have a substantial adverse impact on competition. If the Commission finds no substantial adverse impact it must approve the transaction. Accordingly, our analysis in the exemption context *need not* be broadened beyond consideration of those aspects of the RTP that deal with competition. We *need not* look at RTP issues unrelated to the purpose

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[1]The ALJ also considered evidence relating to yet another RTP factor concerning the safety of railroad operations, 49 U.S.C. § 10101a(8). He determined, however, that safety is not threatened by this transaction. *See* ALJ I.D. at 16.

> of section 11344. The RTP criteria must be analyzed, but in a way that does not subject the applicable factors to a higher level of scrutiny than would apply in the context of a formal application.

Finance Docket Nos. 31,472 & 31,485, *Indiana Rail Road Co.—Petition for Exemption—Illinois Cent. R.R. Co.*, served Aug. 7, 1990, at 3 (ICC Decision) (footnote omitted) (emphases added).

Thus the Commission did not say that the statute *must* be interpreted to preclude the Commission "in the exemption context" from considering RTP factors which arguably do not directly bear on the criteria used in the substantive statutory provision. The Commission was content to hold that under its reading of the statute it was not obliged to consider RTP factors other than those subsumed within section 11344. Although section 11344 requires consideration of the public interest (which would certainly encompass all of the RTP factors) the Commission is to do so only if it finds that a proposed transaction is anticompetitive. Under a full-blown section 11344 proceeding, once the Commission finds that a transaction is procompetitive it must stop its inquiry and approve the merger. Therefore, the Commission reasons that in applying section 10505(a), the exemption provision to section 11344, its deliberations should parallel the process called for in section 11344 itself. The Commission, accordingly, should not even consider factors that do not directly bear on competition when determining whether an exemption should be granted. "The RTP criteria must be analyzed, but in a way that does not subject the applicable factors to a higher level of scrutiny than would apply in the context of a formal application." ICC Decision at 3. By "higher level of scrutiny" the Commission evidently means taking into account a broader number of factors. That seems to me a quite reasonable construction of the statutory language but it is hardly inevitable.

Although the majority describes the petitioners as asking that the Commission make a "finding" as to the other than competitive factors, that is not quite accurate. The

petitioners asked only that the Commission consider other RTP factors before it "finds" that "the application of [the Interstate Commerce Act] is not necessary." I can well imagine another Commission, perhaps less committed to deregulation, reasonably interpreting the two sections of the statute as permitting the Commission to consider, at least briefly, factors other than those focusing on enhancing competition when determining whether to grant an exception under § 10505(a) from § 11344. Such a future Commission might well reason that it is permitted under § 11344 to ignore the public interest only if it determines after the full-blown procedures of that section that a proposed transaction will have no anticompetitive effect. Because without the full procedures the Commission may have less confidence in its own determination of the proposed transaction's impact on competition, it might well wish to take a quick look at the other public interest factors, namely the RTP factors, before granting an exemption.

Certainly there is nothing in the express language of the statute which limits the Commission's authority to take such an approach. As I said earlier, Congress was completely silent as to RTP factors to be considered by the Commission with respect to any given exemption request. No one has suggested any legislative history that would reveal a specific intent on the point. Moreover, the RTP factors are hardly precisely drafted and are not mutually exclusive. The Commission never even specified which of these factors were directly relevant in this case. The majority only deduces that the Commission meant to refer to section 10101a(1), (4), (5) and (13). Indeed, the language of section 10505(a) might actually be thought to point more to petitioners' construction than the Commission's. It will be recalled that the exemption provision has two criteria which must be applied, and the second includes the language "the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power." 49 U.S.C. § 10505(a)(2)(B). Certainly that concept is at the core of any concerns about

competitiveness. The criterion that the statutory section from which an exemption is granted "is not necessary to carry out the transportation policy of section 10101a," was not intended to be limited to competitiveness concerns.

In sum, the issue presented to us by petitioners—whether the Commission must consider more than competitiveness factors in approving an exemption from section 11344—is a paradigm *Chevron* "Step II" issue. *Chevron*, 454 U.S. at 843-44; *General Motors Corp. v. NHTSA*, 898 F.2d 165, 169 (D.C. Cir. 1990); *Bridgestone/Firestone v. Pension Benefit Guar. Corp.*, 892 F.2d 105, 110-11 (D.C. Cir. 1989). Congress has not directly addressed the question and so we must defer to any reasonable agency interpretation. Particularly since the agency in its opinion claimed only that it was not required by the statute to consider more than it did, it would be astonishingly inappropriate for us to say or even imply that the Commission could not have considered other factors if it wished.

Whatever may be the Commission's general authority under section 10505 to consider RTP factors not concerning competitiveness when considering a grant of an exemption from § 11344, the real issue is this case centers on the Commission's rejection of the ALJ's concern for the impact of the proposed transaction on employees.[2] And here I think the majority misunderstands both the relationship between § 11344 and § 11347 and the Commission's decision. It is simply not so that the Commission must authorize a transaction under § 11344 if only the two criteria set forth in that section are met. Section 11347 imposes another separate condition:

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[2]We have before us as one of the petitioners the omnipresent Patrick W. Simmons, the Legislative Director of the United Transportation Union (UTU). We have previously noted that Simmons does not have standing personally. *United Transp. Union v. ICC*, 891 F.2d 908, 909 n.1 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 3271 (1990). Only the UTU, as the representative of affected workers, has standing, but nonetheless Simmons continues to petition and file briefs in his own name. After reading far too many of these briefs, I have concluded that the captions of these petitions is the least of the union's concerns.

> When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565).

49 U.S.C. § 11347.

It is undeniable that § 11347 labor protective provisions directly implicate the fair wages and suitable working conditions goal of the Railroad Transportation Policy. To be sure, as the majority notes, the Commission required that the so-called *New York Dock* protective provisions be applied, providing employees with a level of protection that the Commission traditionally imposes in approving a § 11344 transaction, but that is hardly the point. The point is that even following the majority's own logic section 10101a(12) is just as relevant to the Commission's consideration of this exemption as sections 10101a(4), (5), and (13) because the Commission *must* consider the transaction's impact on employees in the "full-blown" § 11344 proceedings.

The Commission, as I read its opinion, understood the point; it did not say that it need not (let alone must not) consider section 10101a(12) in granting the exemption. Instead, it said that:

> finally we note that the only RTP provision dealing with rail labor (section 10101a(12)) refers to "fair wages and safe and suitable working conditions" . . . the wages of the affected IC employees[15] are protected by the imposition of standard labor protection provisions.

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[15]As the ALJ noted, although 19 IC employees' jobs are affected by these transactions, only one position

> will be abolished, with the other 18 employees reassigned to other comparable positions in IC's system. Moreover, IRRC's operations over the line will require 7 additional employees.

ICC Decision at 6. In other words, the Commission did consider the very factor that petitioners claim it should have. The Commission might well have weighed that factor differently and disapproved the exemption (as the ALJ recommended) and I seriously doubt that we would have any cause to disapprove such a decision.

Paradoxically, the majority is defending the Commission for not doing what it actually did. The Commission did say that under the *regular* 11344(d) procedure labor concerns are addressed not in that subsection but rather in section 11347, *see* Maj. Op. at n.4, but the Commission decidedly did not say that it was not permitted to consider labor concerns when determining whether to grant an exemption to 11344(d). And it most assuredly did not say, as does the majority at the end of n.4, that the "railroads here did not seek an exemption from § 11347," implying that by seeking an exemption from 11344(d) alone the railroad could break the statutory link between sections 11344 and 11347. That may be a possible interpretation, but it is not one the Commission adopted.

For all the above reasons, I think it is rather obvious that the court's holding on the issue of statutory interpretation must be read as limited to affirming a permissible construction and application of the statute. Surely it would be unfortunate if the court's opinion were read as differing with the Commission and holding that the Commission was obliged to construe the statute as precluding the approach taken by the ALJ regarding the impact on workers (or indeed the actual construction followed by the Commission). In *Chevron* the Supreme Court admonished this court not to prevent an agency wishing to relax regulation from interpreting undefined and imprecise statutory language. It would be a cruel twist if we were now to violate *Chevron*'s principles to freeze present *deregulatory* efforts against the possibility that future

appointees of commissions like the ICC would come to office with a different political and economic agenda.

[1] **APPENDIX B**

SERVICE DATE
AUG 7 1990

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31472

INDIANA RAIL ROAD COMPANY
— PETITION FOR EXEMPTION
— ACQUISITION AND OPERATION
— ILLINOIS CENTRAL RAILROAD COMPANY
— LINE BETWEEN SULLIVAN, IN, AND BROWNS, IL

Finance Docket No. 31485

INDIANA RAIL ROAD COMPANY
— TRACKAGE RIGHTS EXEMPTION
— ILLINOIS CENTRAL RAILROAD COMPANY AND
INDIANA HI-RAIL CORPORATION

Decided: July 30, 1990

By timely filed appeals[1] Indiana Rail Road Company (IRRC) and Illinois Central Railroad Company (IC) seek review of the initial decision of Chief Administrative Law Judge (ALJ) Paul

[1]Under Commission regulations, 49 CFR 1115.2(a), appeals from an initial decision of an ALJ (in proceedings other than those involving rail line abandonments) are permitted as of right. If timely filed, such appeals automatically stay the decision's effect pending the appeal. Appeals must be based on one of the following grounds: (1) that a necessary finding of fact is omitted, erroneous, or unsupported by substantial evidence of record; (2) that a necessary legal conclusion, or finding is contrary to law, Commission precedent, or policy; (3) that an important question of law, policy, or discretion is involved which is without governing precedent; or (4) that prejudicial procedural error has occurred. 49 U.S.C. 1115.2(b).

S. Cross, served June 1, 1990 (*Initial Decision*).[2] Protestants Patrick W. Simmons (Illinois Legislative Director for United Transportation Union), Village of Palestine, IL, City of Robinson, IL, and Willow Hill Grain, Inc. (collectively protestants) replied[3] on June 21, 1990.[4] By petition filed June 29, 1990, the American Short Line Railroad Association (ASLRA) seeks to intervene and file a brief in suport of IRRC's appeal.[5]

[2] On July 2, 1990, IRRC replied to protestants' June 21 pleading.[6]

BACKGROUND

By petition filed September 28, 1989, in Finance Docket No. 31472, IRRC, a Class III carrier, seeks exemption under 49 U.S.C. 10505(a) from the provisions of 49 U.S.C. 11343

[2]Letters were submitted to the Commission by Senators Richard G. Lugar and Dan Coats on June 25 and July 2, 1990, respectively, and by Congressman John Myers on July 16, 1990. Senators Coats and Lugar support IRRC's petition. Congressman Myers urges the Commission to give prompt and careful review to the issues in this proceeding.

[3]By petition filed June 19, 1990, protestants also seek recall of these cases from the Office of proceedings, and request "reassignment to the Chairman or to an individual Commissioner for further handling." This appeal is being "handled" by the members of the agency, who alone have decisional authority and responsibility. Petitioners' request is denied.

[4]In their reply, protestants request oral argument.

[5]We will grant ASLRA's petition to intervene.

[6]Replies to replies are not permitted by our regulations. 49 CFR 1104.13. Although IRRC requests permission to file its reply, it fails to adequately justify its request. We, therefore, reject it. Similarly, we will reject protestants' July 3, 1990, supplement to their reply. We note, however, that protestants' June 21 reply also contains a "protective" appeal from the ALJ's market abuse finding. To the extent IRRC'S reply addresses this appeal, we accept its July 2 pleading. Protestants filed a reply on July 12, 1990, urging us to strike IRRC's reply.

The Regional Railroads of America (RRA) filed a statement on July 9, 1990. Protestants request that we also strike this statement. We will grant this request and strike RRA's pleading inasmuch as the pleading is unsigned, bears no address, and contains an unsigned certification of service.

to acquire two rail line segments, totalling 90.3 miles, from IC, a Class I carrier. The first segment is a 46-mile line between Sullivan, IN and Newton, IL; the second is a 44-mile segment between Newton and Browns, IL. IRRC also filed a notice of exemption in Finance Docket No. 31485, to acquire trackage rights over: (1) IC's 5-mile rail line between Newton and the Wye connecting tracks to the Central Illinois Public Service Company facility at Lis, IL; and (2) an 11.2-mile segment of track owned by the Indiana Hi-Rail Corporation (IHRC) between Browns, and Grayville, IL.[7] As part of their agreement, IC and IRRC will interchange traffic on IC's track at Newton, IL.

On April 13, 1990, the Commission referred these matters to an ALJ for public hearing and an initial decision. By initial decision served June 1, 1990, Judge Cross found that the proposed acquisition was not anticompetitive and that regulation was not necessary to prevent market abuse but nevertheless denied the exemption petition and revoked the trackage rights exemptions. For the reasons discussed below, we reverse.[8]

DISCUSSION AND CONCLUSIONS

We will first discuss the appropriate decisional criteria, and then turn to the application of those criteria here. We are re-
[3] quired to exempt a transaction under section 10505 when we find that: (1) continued regulation is not necessary to carry

[7]The trackage rights exemptions were filed pursuant to the class exemption of 49 CFR 1180.2(d)(7), and became effective by notice served October 27, 1989.

[8]Apart from his flawed legal analysis, upon which this decision primarily focuses, we disagree with the ALJ's factual conclusion that the sole purpose of the transaction is employee removal. That finding is difficult to reconcile with various other findings in the ALJ's decision suggesting the transaction's potential, salutary effects. Examples include the ALJ's finding that the transaction may increase the competitive options available to shippers by providing neutral access to five long-haul carriers where there is currently access to only one.

out the rail transportation policy; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. Applicants seek exemption from section 11343 *et seq.* Thus, we must first determine whether a proceeding under section 11343, rather than an exemption from its provisions, is required to carry out the rail transportation policy (RTP). If we find it is not, we must consider whether the transaction is of limited scope or is likely to subject shippers to an abuse of market power. If, on the other hand, we conclude that a proposed exemption is contrary to the RTP, we need not consider the issues of limited scope or market abuse.

In determining whether regulation of a transaction proposed for exemption under section 10505 is necessary to carry out the RTP, our analysis generally focuses on the criteria relating to the underlying statute from which exemption is sought. We need not extend our analysis beyond what we would address in an application proceeding itself. *See* Finance Docket No. 31493, *Blackstone Capital Partners L.P. — Control Exemption — CNW Corporation and Chicago and North Western Transportation Company Et Al.* (not printed), served July 5, 1989, at 2. Section 10505 provides a shortcut analysis to see if regulation — in this case under section 11344(d) — is necessary. If section 11344(d) does not require review of particular issues, neither does the section 10505 process.

Under section 11344, Congress has limited the Commission's jurisdiction to consideration of whether a transaction would have a substantial adverse impact on competition.[9] If

[9]Section 11344(d), which establishes the decisional criteria for acquisitions such as this, states, in part:

> In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall approve such an appication unless it finds that-
>
> (1) As a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopo-

the Commission finds no substantial adverse impact it must approve the transaction. Accordingly, our analysis in the exemption context need not be broadened beyond consideration of those aspects of the RTP that deal with competition. We need not look at RTP issues unrelated to the purposes of section 11344. The RTP criteria must be analyzed, but in a way that does not subject the applicable factors to a higher level of scrutiny than would apply in the context of a formal application. For example, protestants have contested the financial viability of IRRC and its ability to provide service after it [4] acquires the line.[10] The financial viability of IRRC is only relevant, however, if it can be shown that the transaction will threaten the purchaser's ability to compete, thus creating an anticompetitive effect contrary to section 11344(d). *See Rio Grande Industries, Et Al.-Pur. & Track.-CMW Ry. Co.*, 5 I.C.C.2d 952, 969 n. 17, (1989); and *Rio Grande Industries, Inc., Et Al;. — Purchase and related Trackage Rights — Soo Line Railroad Company Line Between Kansas City, MO and Chicago, IL* (not printed), served April 6, 1990 (Decision No. 14), at 3.

Protestants argue that reliance on *Blackstone* is misplaced, stating that in the past the Commission has followed the standards of section 10505(a) in exemption decisions without reference to or use of the standards of the statutory provisions from which exemption is sought. To support their argument that the Commission may not consider the statute from which exemption is sought in making its RTP analysis under section 10505(a)(1), protestants city *Illinois Commerce Com'n v. ICC*, 787 F.2d 616, 635 (D.C. Cir. 1966) (*Illinois*). They

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ly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

[10]The ALJ found that the record indicated that the financial condition of IRRC is sound. *Initial Decision*, at 17. We agree.

claim that the court there decided this very point and set aside the Commission's decision on this basis.

Protestants' argument is correct — we have frequently granted exemptions without specific reference to the provisions of the underlying statute — but irrelevant. In the vast majority of exemption proceedings this issue never arises and, therefore, there is no need to address it. *Illinois* does not stand for the proposition argued by protestants. First, the discussion cited by protestants does not refer to the RTP criteria used in an exemption analysis under section 10505(a)(1). The court discussed instead the provisions of 10505(a)(2) (*i.e.*, whether the transaction is of limited scope or has the potential for market abuse). Second, the pivotal finding by the court of Appeals in *Illinois* was that the Commission erred with respect to its RTP analysis because it failed to make "all of the findings prerequisite to a determination that *application of the statutory provisions* on abandonment is unnecessary to carry out the rail transportation policy" (emphasis added). *Id.* at 632. This reference in *Illinois* to the underlying statutory provisions clearly leaves open our ability, in making an exemption decision, to take into account the requirements for approval in the underlying provision from which the exemption is sought.

Applicants claim that the ALJ erred in finding that the proposed exemption constitutes a "breach" of the RTP which warrants denial of the exemption petition. They note that the ALJ specifically found that the proposed IRRC transaction was not anticompetitive. *Initial Decision* at 15. Thus, they maintain, the ALJ found that the proposed transaction met the appropriate statutory standard of 49 U.S.C. 11344(d), and that his section 10505 analysis in this case should have ended there.

Protestants claim that the ALJ's competitive finding is flawed because it was not made in a proceeding under section 11343. They maintain that if the proceeding were a formal application under section 11343, they would have filed additional

evidence on the competition issues. Further, they claim that we must consider each relevant element of the RTP in an exemption proceeding, and that if the exemption request runs [5] afoul of even one of these elements, a formal application is required. We disagree.

Protestants' argument on competition is unpersuasive. The essence of an exemption proceeding is that a decision is reached on the relevant RTP criteria (such as competition) on an expedited basis. The effect of this transaction on competition has been an issue in this proceeding from the beginning. One of IRRC's arguments in favor of the acquisition, with which the ALJ agreed, is that IRRC's operation of the line will enhance competition among transportation carriers. Protestants have had ample time and opportunity in which to submit evidence on this issue, yet they have failed to do so.[11]

We agree with applicants that the ALJ's finding that the transaction will have no anticompetitive effects[12] is dispositive of the RTP issue. It appears[13] that the ALJ relied upon subsection 11344(d)(2) in basing his decision on the effects of the transaction on rail labor and the affected community. But section 11344(d) provides that we "shall approve" applications filed thereunder unless we find that *both:* (1) "as a result of the transaction, there is likely to be substantial lessening of competition, . . ."; *and* (2) "the anticompetitive effects of

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[11]Protestants also argue that "all relevant criteria" must be satisfied before an exemption is granted. We agree and, as herein noted, find that those criteria have been satisfied.

[12]The ALJ, in fact, implied the transaction would be procompetitive. *I.D.* at 20.

[13]The ALJ does not specify what aspect of the RTP is "breached" by the proposed transaction. Rather, he merely states that ". . . the Commission should conclude that the subject transaction has no substantial purpose other than employee removal and deny the application (sic) on the basis of a breach of the NTP." *Initial Decision* at 20-21. His ultimate finding was that ". . . the transaction is contrary to the National Rail Transportation Policy. . . ." *Id.*

the transaction outweigh the public interest in meeting significant transportation needs." The language of the statute requires that both findings be made before an application filed under the section is denied. Since a finding of "anticompetitive effect" under subsection 11344(d)(1) is a predicate to an analysis under subsection 11344(d)(2), a finding that a transaction is not likely to result in a substantial lessening of competition precludes consideration of the transaction under subsection 11344(d)(2). *Cf. People of State of Ill. v. ICC*, 687 F.2d 1047, 1053 (1987).[14] Moreover, in contrast to section 11344(b)(1)(D), section 11344(d) does not include the effects on employees as a decisional criterion. *Crounse v. ICC*, 781 F.2d 1176, 1192 (6th Cir. 1986). (Rather, for section 11344((d) transactions, such concerns are addressed only through the protective conditions required by section 11347.) Finally, we [6] note that the only RTP provision dealing with rail labor [section 10101a (12)] refers to "fair wages and safe and suitable working conditions." The ALJ found that safety was not a concern here, and the wages of the affected IC employees[15] are protected by the imposition of standard labor protection provisions. In light of the above, we find that the application of section 11343 *et seq.* to this transaction is not necessary to carry out the RTP.

We now turn to the issues of limited scope and market abuse. As mentioned, the initial decision found that the tran-

[14]There the Seventh Circuit, ruling on a merger *application* subject. to 11344(d), found that: "The mandatory language 'shall approve' of section 11344(d), taken in context, denotes that if the Commission finds no substantial anticompetitive effects flowing from the proposed transaction its analysis is at an end. At that point, the Commission ***must*** approve the transaction, and any finding about consistency with the public interest would be superfluous."

[15]As the ALJ noted, although 19 IC employees' jobs are affected by these transactions, only one position will be abolished, with the other 18 employees reassigned to other comparable positions in IC's system. Moreover, IRRC's operations over the line will require 7 additional employees.

saction: (1) will not subject shippers to market abuse; and (2) is not of limited scope. As noted above, if the Commission finds that the transaction will not result in market abuse, it does not reach the issue of whether the proposed acquisition is of limited scope and vice versa.

We agree with Judge Cross that there is nothing in the record to indicate that market abuse will result from the proposed transaction. If the transaction is consummated, IRRC could interchange traffic to and from the lines in question with six different rail carriers.[16] We disagree with protestants that shippers will no longer have an adequate supply of cars once IC is no longer obligated to supply them. At the oral hearing, IRRC's president, Mr. Thomas G. Hoback, testified that the IRRC has never failed to meet a service commitment or request on its other lines. The ALJ notes that IRRC has increased its car handling from 11,265 cars in 1986 to 22,018 cars in 1989. *Initial decision* at pp. 8-9. As a result, we see no reason to doubt IRRC's assurances that it will be responsive to the shippers' needs once it acquires the lines.

We also disagree with the "opinion" expressed in the ALJ's initial decision that the proposed acquisition transaction is not of limited scope. The transaction involves the acquisition and operation of rural rail lines 90.3 miles in length. It does not involve any new securities issuance or significant restructuring of rail operations.[17] In the past, the Commission has found

[16]The possible interchanging carriers are the IHRC, the Consolidate Rail Corporation, CSX Transportation, Inc., the Norfolk Southern Corporation, the Soo Line Railroad Company, and IC.

[17]Protestants make several references to the possible sale of the Newton-Browns line to IHRC by IRRC, once IRRC acquires the line from IC. At the moment, there is no proceeding before the Commission dealing with a line sale from IRRC to IHRC. Any arguments regarding this sale may be raised once any such transaction is formally before the Commission in a docketed proceeding. *Cf.* 49 CFR 1180.1(g). We note, however, that on July 18, 1990, IHRC filed a verified notice of exemption for trackage rights pursuant to 49 CFR 1180.2(d), entitled Finance Docket No. 31594, *Indiana Hi-Rail Corporation — Trackage Rights — Indiana*

[7] line acquisitions of greater lengths than this to be of limited scope. *See*, Finance Docket No. 31482, *Mid Michigan Railroad Company, Inc. — Purchase Exemption — The St. Joseph & Grand Island Railroad Company Line Between St. Joseph, MO and Upland, KS* (not printed) served August 7, 1989 (in which the sale of 107.3-mile line segment was found to be of limited scope). We, therefore, find the transaction to be of limited scope.

Since regulation of the proposed acquisition is not required by the RTP, and the proposed transaction will not subject shippers to market abuse and is of limited scope (thus satisfying the requisites of section 10505), we will exempt the transaction from the prior approval requirements of section 11343, *et seq.*

Turning to the revocation of the trackage rights exemption, the ALJ did not address at length his reasons for revocation and we see nothing in the record that would warrant such action. Under 49 U.S.C. 10505(d) the Commission has authority to revoke an exemption in order to carry out the RTP. As discussed above, transactions contravene the RTP. As a result, we are reversing the ALJ's decision to revoke the trackage rights exemption.

Protestants argue that if the initial decision is not summarily affirmed, the proceedings should be set for oral argument. We disagree. Although the issues are important, they have been addressed at length by both parties in pleadings submitted pursuant to the original exemption proceeding, in pleadings and oral testimony submitted pursuant to the oral hearing held on

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Rail Road Company Between Newton and Browns, IL. In that proceeding IHRC seeks trackage rights from IRRC over the line segment between Newton and Browns. On July 23, 1990, UTU and Village of Palestine supplemented its previous pleadings in the instant proceeding by filing copies of comments, a protest, and a petition to reject or revoke and stay, which they filed in Finance Docket No. 31594. The Commission will consider and rule on these filings in Finance Docket No. 31594.

May 2, 1990, and, finally, in pleadings submitted pursuant to this appeal. Protestants have not shown that oral argument would add anything to the record in this proceeding that protestants have not had a prior opportunity to present in written pleadings. Accordingly, we will deny protestants' request for an oral argument.

As noted above, under 49 U.S.C. 10505(g)(2), the Commission may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions in *New York Dock Ry. — Control - Brooklyn East, Dist.*, 360 I.C.C. 60 (1979).

The Commission's Section of Energy and Environment (SEE) has examined petitioner's environmental report and analyzed the probable effect of the proposed transactions on the quality of the human environment. Based on SEE's assessment, we conclude that the proposals, if implemented, will not significantly affect the quality of the human environment or conservation of energy resources. Pursuant to section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, SEE has consulted with the appropriate Indiana and Illinois agencies. The Indiana State Historic Preservation Officer (SHPO) has no objection to the sale. The Illinois SHPO, however, has informed SEE that more information is needed from IRRC before a ruling can be made. Until the section 106 process has been completed, IRRC must not take any action that would jeopardize the integrity of potentially historic [*e.g.*, 50 years [8] old or older, 36 CFR 60.4, 46 F.R. 56189)] sites, structures, and/or culturally significant locations.

It is ordered:

1. The initial decision of the Administrative Law Judge served June 1, 1990, is reversed.

2. Under 49 U.S.C. 10505, we exempt from the re-

quirements of 49 U.S.C. 11343, *et seq.*, the Indiana Rail Road Company's purchase of the above-described 90.3-miles of rail line of the Illinois Central Railroad Company, subject to the employee protective conditions in *New York Dock Ry. — Control — Brooklyn East. Dist.*, 360 I.C.C. 60 (1979).

3. The decision to revoke the trackage rights notice of exemption is reversed.

4. The request for oral argument is denied.

5. Notice will be published in the *Federal Register* on August 8, 1990.

6. The exemptions will be effective on August 22, 1990.

By the Commission, Chairman Philbin, Vice Chairman Phillips, Commissioners Simmons, Lamboley, and Emmett. Commissioner Simmons was absent and did not participate in the disposition of this proceeding.

Sidney L. Strickland, Jr.
Secretary

(SEAL)

[1] **APPENDIX C**

SERVICE DATE
JUN 1 1990

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31472

INDIANA RAIL ROAD COMPANY
— PETITION FOR EXEMPTION
— ACQUISITION AND OPERATION
— ILLINOIS CENTRAL RAILROAD COMPANY-
— LINE BETWEEN SULLIVAN, IN, AND BROWNS, IL

Finance Docket No. 31485

INDIANA RAIL ROAD COMPANY
— TRACKAGE RIGHTS EXEMPTION
— ILLINOIS CENTRAL RAILROAD COMPANY AND
INDIANA HI-RAIL CORPORATION

Decided: May 30, 1990

By Paul S. Cross, Administrative Law Judge:

By petition filed September 28, 1989, in F.D. No. 31472, Indiana Rail Road Company (INRD) seeks exemption under 49 U.S.C. 10505(a) from the provisions of 49 U.S.C. 11343, with respect to a proposed purchase by INRD of an Illinois Central Railroad Company (IC) line between Sullivan, IN and Browns, IL, a distance of 90.3 miles, consisting of two connecting segments, one an east-west track between milepost 109.0 at Sullivan and milepost 155.0 at Newton, IL and the other a north-south track between milepost 160.0 at Newton and milepost 204.3 near Browns.

Also, in F.D. No. 31485, on September 28, 1989, INRD filed a notice of exemption for its acquisition of overhead trackage rights between milepost 155.0 at Newton and a

"Wye" connection with the Central Illinois Public Service Company (CIPS) facility at mile post 160.0 at Lis, IL, a distance of 5 miles; and assignment of IC's existing trackage rights over Indiana Hi-Rail Corporation (IHRC) line between milepost 204.3 at Browns and milepost 215.5 at Grayville, IL, a distance of 11.1 miles. INRD's trackage rights notice was filed pursuant to the socalled trackage rights class exemption.

The trackage rights matters in F.D. No. 31485 already are effective but have not been implemented because they are entirely dependent upon the lead transaction in F.D. No. 31472. Because both INRD and IC are rail carriers, 49 U.S.C. § 11343 requires approval of the proposed purchase acquisition in F.D. No. 31472 by the Commission, unless the transaction is specifically exempted under 49 U.S.C. § 10505. Such specific approval has yet to be granted.

INRD's also proposes a sale of the Newton-Browns line to Indiana Hi-Rail Corporation (IHRC) pursuant to a settlement agreement. The sale is subject to financing and Commission approval or exemption. The sales price is $1,000,000. Pending acquisition, IHRC will hold interim trackage rights over the Newton-Browns line pursuant to a class exemption notice which will be filed immediately upon consummation of the lead transaction.

INRD's petition and notice drew substantial opposition. There is shipper and community opposition, that of labor organizations, and others as set forth in the following sections of this decision. However, an initial protestant, IHRC, subse-
[2] quently withdrew. That rail carrier on November 6, 1989, filed a vigorous pleading in opposition to INRD's acquisition of the Newton-Browns segment, and requested revocation of the trackage rights exemption between Browns and Grayville. In addition to its November 6, 1989 protest, IHRC's President, R. Powell Felix on November 9, 1989 filed a verified statement in support of IHRC's protest.

INRD requested an extension of time for INRD to respond to the IHRC filings until December 8, 1989, which was granted by decision served December 5, 1989. INRD stated that it was attempting to resolve issues through negotiation.

INRD thereafter sought a second extension of time within which to respond to IHRC, and again the Commission, by decision served December 26, 1989, extended INRD's response date to December 26, 1989.[1] In spite of the extensions, INRD never responded to IHRC's filings.

Instead, on January 22, 1990, IHRC withdrew its protest and petition to revoke, along with the verified statement of R. Powell Felix; and on February 2, 1990, Mr. Felix filed a letter with the Commission, in which he stated that while IHRC had protested the sale of the Newton/Browns segment to INRD, IHRC has now reached an agreement with INRD that resolved their differences. Mr. Felix added that granting INRD's petition will permit INRD to connect with IHRC, to their mutual advantage.

IHRC's principal concerns related to INRD's proposed acquisition of the Newton-Browns line and the Grayville trackage rights. Specifically, IHRC was concerned that INRD's acquisition of the Newton-Browns line would sever IHRC's connection with the IC and thus its ability to operate as a switching carrier for IC. IHRC also was concerned at the possibility that INRD would so increase traffic over the Grayville track which is owned by IHRC that operations of IHRC particularly into Peavey Grain at Browns, would be adversely affected. The protest also asserted that IC was in default under a trackage rights agreement with IHRC, and that IHRC had terminated that agreement, thus precluding assignment by IC to INRD.

The Commission on April 13, 1990 (dated April 2) referred the proceedings to the Office of Hearings for local hearing and

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[1] I mention these time extensions for INRD, in view of its complaint of delay in processing by the Commission.

an initial decision. The Commission, by its Director, Office of Proceedings, stated the record has closed, and that the key concern is the viability of the purchaser. On the same date, April 13, 1990, hearing was scheduled for May 2, 1990.

Patrick W. Simmons (UTU), a protestant herein petitioned on April 17, 1990 for discovery from INRD of (1) the purchase and sale agreement, and associated agreements, between IC and INRD; (2) the September 5, 1985 agreement between IC and IHRC; and (3) the settlement agreement between INRD and IHRC that led to IHRC's withdrawal from the proceedings. Two days later, on April 19, 1990, UTU filed an appeal with respect to the April 13, 1990 decision by the Director, Office of proceedings, asking that the record not be deemed "closed," but open for evidence.

INRD on May 1, 1990, filed a motion for a protective order, with respect to its certified financial statement for 1989, asking that the statement be kept confidential.

[3] Hearing was held May 2, 1990 at Robinson, IL. UTU's appeal with respect to the scope of the hearing was granted. INRD's request for a protective order was denied, subject to further consideration, with a 5-days post-hearing submission. Subsequently, on May 14, 1990, INRD's request for a protective order was denied for the reason that most of the financial information already was public, and that there was no basis for a closed hearing.

At the hearing, UTU was furnished a copy of the purchase and sale agreement and associated agreements between IC and INRD, and this was entered as an exhbit. The settlement agreement between INRD and IHRC also was requested, and INRD seemingly agreed to furnish a finalized copy. However, INRD has not filed the final agreement. Therefore, UTU filed a motion to have the agreement (draft) received as a late-filed exhibit.[2] It is hereby received. Finally, INRD stated it

[2]The portion of the draft agreement subject to revision is a provision permitting direct interchange between IHRC and IC at Newton.

could not comply with a discovery request for the September 5, 1985 IC-IHRC agreement since it was not in INRD's possession. UTU also seeks an agreement between Hoosier Energy and IC which substitutes INRD as the owner of about four miles of track between Sullivan and Merom, IN where there is a power plant. Apparently, Hoosier spent milions of its own funds to "rehab" the IC track west from Sullivan to Merom and has some say in its use. Presently, CSXT serves the plant over IC track. In the future, CSXT would serve the plant over INRD track.

There were 33[3] witnesses that testified at the hearing. An additional 11 persons who could not be present submitted verified statements. In general, those concerned with the Newton-Browns segment supported INRD's acquisition, but did so with the clear understanding that the line would be resold to IHRC. In general, those concerned with the Sullivan-Newton segment were opposed to the sale. There were a number of witnesses who were neutral, and presented their concerns to the Commission. Of course, in stating that the public witnesses, in general, supported IHRC operation between Newton-Browns, and opposed INRD's operation between Sullivan and Newton, there were those of contrary views in both groups.

Of the 33 witnesses who testified, two were from INRD, one from IHRC, and one from IC. UTU presented three witnesses.[4] Two witnesses presented statements from elected officials, one being the U.S. Congressman for the affected district, Honorable Terry Bruce,[5] and the other spokesman

[3]Although the index for the hearing transcript shows 32 witnesses, IHRC's President Felix provided some unsworn information from the audience. He left a verified statement but disappeared from the hearing without any direct explanation of his departure.

[4]INRD presented Hoback and Quigley; IHRC's witness was Felix; IC's witness was Richter; UTU's witnesses were Burner, Simmons and Rich.

[5]Congressman Bruce asked that consideration be given to the communities. "Although the Commission is to make their decision based on

[4] appearing on behalf of State Senator Harry (Babe) Woodyard and Rep. Michael L. Weaver.[6]

An expedited briefing schedule was ordered, upon the representation of INRD that the agreement for purchase and sale between IC and INRD will expire in early July, 1990. (Tr. 246).[7]

STATEMENT OF FACTS

Applicants Evidence

INRD was formed in 1985 by Thomas G. Hoback and a group of investors who were interested in opportunities for regional railroading. In 1986 INRD acquired its first line of railroad, the IC line running from Indianapolis, IN to Sullivan (Indianapolis Line). This transaction was exempted from regulation pursuant to the class exemption for non-carrier acquisitions.

In August 1989 INRD acquired by lease from Norfolk & Western Railway Company a line of railroad running from Indianapolis to Tipton, IN (Tipton Line). The Commission exempted this lease from regulation. INRD commenced operations over the Tipton Line on August 14, 1989. The Indianapolis and Tipton lines are connected by an independent "belt-line" or switching carrier at Indianapolis.

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the economics of the rail lines, I would hope that consideration would also be given to the economics of the communities involved." (Tr. 10).

[6]These elected Illinois officials asked examination of the current potential buyers, both in retrospect and for future reliability, ". . .we request that you broaden the scope of investigation to include both the operations of the current owners and potential buyers, both in retrospect and with a view toward reliability of future service and employment." (Tr. 11).

[7]I am unable to find any such cut-off date in any of the agreements to which IC is signatory. On brief, applicant says the "drop-dead" date is July 30, 1990.

At present, shippers on the Newton and Browns Line are served by the IC which is in the final phase of downsizing its operations. It has questionable interest in traffic originating or terminating on the Newton-Brown line which is a poor state of repair with a 10 M.P.H. operation. The Sullivan-Newton line permits a 35 M.P.H. operation and is in relatively good condition. However, IC appeared at the hearing in support of the entire application. INRD interest is to serve only the Sullivan-Newton segment but will not add to the car supply and will operate older less powerful locomotives than IC. The testimony of Mr. Ryd Wallerstedt, the General Manager of Cima Grain at Newton illustrates the problem facing shippers in choosing between IC and INRD. (Tr. 107 - 108):

> My name is Ryd Wallerstedt, I am general manager of Cima [Seimer] Grain at Newton and I'm here today, not particularly in support of either side, but in support of the farmers from Jasper and Crawford Counties.
>
> The corn from this area for the past 25 years has moved either by truck down to the river or to the Southern Railway. What rail movement has occur- [5] red has gone to the — either the Decatur market or to Cairo, which can either be put on a barge or go on into the Mississippi poultry market. The natural market for this corn is the southeast poultry industry, as evidenced by the amount of trucking that occurs to both the Southern Railway and the CSX.
>
> The IC has never saw fit to compete with the trucks to get to the carriers that serve the poultry industry; that is the CSX and the Norfolk-Southern.
>
> I believe whether it's Indiana Rail Road or some other carrier, that we need a railroad in here who will compete with the trucks and give us rates where we can go to what I call our natural market for corn.

It may be noted, that as a result of the IHRC-INRD settlement, southbound traffic of this shipper would move in the service of IHRC, not INRD.

In the sales agreement between IC and INRD, IC expressed its largely unenforceable interest in supplying necessary grain cars to grain shippers on the lines to be sold, an interest that is not backed up by specific numbers, but instead by a well intended February 22, 1990 letter of Mr. Gerald F. Mohan, IC's Senior Vice President of Marketing.

Mr. Hoback believes that the IC has an economic interest in supplying grain cars to customers on the INRD (Tr. 76 - 77):

> Q. (By Mr. Broadley) Mr. Hoback, does the Illinois Central have an economic interest in supply(ing) grain cars to customers on the Indiana Rail Road?
>
> A. Absolutely.
>
> Q. Can you tell me what the nature of that interest is?
>
> A. Illinois Central has a vested interest in trying to generate profitable freight on their railroad and one of the reasons they engage in line sales is because they knew that we could be more effective in generating freight volume than they were. We've been able to feed a lot of new business to them and they would expect to continue to handle a good volume of grain off of this line.

Mr. Hoback believes that his experience with IC on the line that INRD already owns provided the basis for his assertion that the INRD could provide sufficient grain cars. On cross-examination, Mr. Hoback testified as follows (Tr. 67 - 70):

> Q. But isn't part of your agreement with them (IC) that they will provide the cars on an order basis, subject to availability?

A. That is correct. That is the same basis on which they've furnished cars in the past. So basically it's no change from the Illinois Central past policy.

* * *

[6] Q. And the availability of freight cars from Illinois Central, I presume, would be subject to their requirements for use to their direct customer's wouldn't it?

A. My understanding is that Illinois Central will not differentiate whether they serve the customer or we serve the customer directly, and I guess I can only point to my past experience with the Illinois Central who has furnished cars to our existing customers in Indiana and in fact they have preferred to give cars to some shippers in Indianapolis in deference to using other railroads' ownership. So they've used their cars.

Mr. Hoback's testimony also show that both CSXT and IHRC have expressed interest in working with INRD to move grain, and that the interest of those railroads includes making grain cars available but there is no indication that an agreement has been reached with them for car supply. It does appear that IHRC has about 500 grain cars, but it is not shown where they are used. However, there is reference elsewhere to IHRC service for Peavey Grain at Browns.

Mr. Hoback testifies in his Verified Statement at page 20 as follows:

I believe that with careful attention to customer needs and to efficient operations there is a significant opportunity for shortlines and regional railroads to add profitable traffic to the railroad system as a whole. INRD is well situated to act as a retailer of railroad services, gathering traffic from shippers and

> delivering it to long-haul carriers at Indianapolis, Newton and its other interchanges. Because of its lower cost structure, INRD will be able to provide more responsive service to shippers than has been the case in the past. This type of service is more comparable to that offered to shippers by the trucking industry and will permit the railroads to regain traffic that has migrated to truck service.

As noted, the evidence in the record demonstrates that INRD proposes to purchase no additional cars, and presently operates no grain cars. It has added four locomotives to its system, for a total of 13. Except for power units in need of repair, all presently are in operation and no additional units will be acquired for the proposed Sullivan-Newton-Lis operation of INRD (Tr. 53).

Mr. Hoback testifies that INRD will operate the Newton Line with eight employees, only three of whom will be new hires. An existing two-man crew working from Linton will run an existing coal train with four locomotives and about 60 coal cars west over the Sullivan-Newton line to the CIPS power plant at Lis, three days a week. On the east-bound journey from Lis to Linton that crew will service local industries along the line. On alternate days the Linton crew will run west to Lis over the Newton Line again servicing local industries. Apparently, grain, tank, and hopper cars will be attached to the empty coal train movements out of Lis and perhaps to the loaded coal trains as well. Stopping and starting a coal train for [7] local train service may present some operating problems but Mr. Hoback says such will not occur.

INRD will maintain a three man crew and two locomotives at Palestine, IL that would serve local industries in the Robinson area (principally two major shippers — Marathon and Union Carbide) and serve other industries along the Sullivan-Newton line on the days that they are not served by the coal train.

In addition, Mr. Hoback testifies that a station agent, a track supervisor and a mechanical person will be stationed at Palestine. In the case of both Marathon and Union Carbide, INRD has a specific agreement with IC for the provision of IC cars for use by those shippers. Marathon will get up to 250 IC open top hopper cars and Union Carbide will be assigned 108 cars by IC.

Major derailment problems will be handled by Hulcher's, a St. Louis-based company which has special rerailing equipment and which is used by many railroads, including Class I railroads.

Additionally, INRD is already under contract with O.H. Materials of Findley, OH which has developed a Spill Recovery Contingency Plan for the INRD's existing lines. That plan has been used to educate INRD employees on how to respond to a hazardous material spill. O.H. Materials also has special teams equipped to go out on very short notice to deal with hazardous materials spills. O.H. Materials is used for this purpose by major carriers, including Conrail. INRD would extend its existing Spill Recovery Contingency Plan to the lines to be acquired.

Beyond its dubious operating plan, combining local traffic with a unit coal train to and from CIPS at Lis, INRD also has plans to improve the Sullivan-Newton line which already is a 35 M.P.H. line of track. Mr. Hoback testifies as follows (Tr. 34 - 35):

> Q. . . . If the Indiana Rail Road Acquires what I'm going to call the Newton Line, which is the line between Sullivan, Indiana and Newton, Illinois, does Indiana Rail Road have any plans for rehabilitation work on that line?
>
> A. Yes, we do.

Q. Please describe it.

A. We have three projects that we're contemplating. The first is to re-rail about a mile of track between milepost 109 and 110. The track is 90-pound rail, it needs heavier rail. We're going to put some ties in there, some ballast and we'll do some surfacing and also opening up the drainage.

The second project is to rehabilitate several of the yard tracks at Palestine, Illinois which are pretty heavily beaten down. They need quite a few ties, we need to put some new rail in there and it needs to have some ballast.

The third project is the rehabilitaion of the Robinson, Illinois yard just outside the Marathon plant. The trackage is beaten down, it's characterized by numerous broken rails, defective rails, extremely
[8] poor ties condition, its very hazardous and we've estimated it's going to cost about $200,000 to rebuild the Robinson yard.

Mr. Hoback also explains that the existing maintenance of way force of INRD consisting of 13 people would be available for necessary maintenance projects on the Newton Line depending on the job to be done, and that the Newton Line will be maintained with present INRD forces.

As mentioned, INRD has acquired an additional four locomotives to handle increased business including any that will be generated by INRD from acquisition of the subject lines. INRD has its own locomotive repair facility at Indianapolis and for work that cannot be provided in its own shop, INRD uses Conrail's Avon, IN facility. INRD's attention to its power supply is said to be that from start-up in 1986 it has never failed to meet a service commitment or request because of insuffi-

cient power. No documentation at this claim is submitted, and in fact it has had five power failures, four of which occurred on the coal movement to the CIPS plant at Lis while being operated by IC employees. In the case of two of the failures, engine overheating caused severe damage, and although not stated as such, INRD clearly believes that it cannot trust its power to operation by IC employees.

INRD has not done (and is not required to do in an exemption proceeding) a detailed cost analysis of present IC operations. However, evidence in this record establishes that INRD's salary expense of operating over the Sullivan-Newton line will be considerably lower than IC's present wages. This is because INRD's operating plan would cut payroll over $500,000 a year from a reduction in the number of employees, even without taking account INRD's marginal wage scales. While IC currently employs 19 people,[8] INRD plans to employ only eight and in fact all but three of the eight already work for INRD. INRD plans to use two and three-person crews rather than the four-person crews used by IC. Moreover, at least one of the 19 IC employees is paid for an entire year but actually works only 50 days or as needed as an "extra board."

The testimony of Mr. Robert Waldrop, the Lamotte Township Supervisor testifying for the Lamotte Township Board shows that IC's wages per employee, not including benefits, is $44,893 per year. The average benefits per employee is $12,082 per year for an average employee in-

[8]This includes an IC crew based at Olney on the Browns Line. The Browns Line is to be sold to IHRC and operated by IHRC. The eight person manning requirement does not cover the requirements of INRD service on the Browns Line. Allowing an additional two-man INRD crew to serve the Browns Line would reduce the annual labor cost saving of approximately $500,000. However, it is extremely unlikely that INRD ever will operate between Newton and Browns. Even without a sale of that track by INRD to IHRC, the latter will obtain trackage rights for operation over the line. Indeed, at Tr. 64, Mr. Hoback indicates that there would be no INRD operation of the Newton-Browns segment.

come of $56,975 per year. Thus, the reduction in number of employees used to provide the sevice alone will effect cost reductions about 500,000 per year.

In 1986 INRD acquired its Indianapolis Line between Indianapolis and Sullivan. In the last year of IC operation of that line, IC handled 12,000 cars. In the years following INRD acquisition the number of cars handled has risen from 11,265 [9] for nine months of 1986 that INRD owned the line, to 12,514 cars in 1987, 16,807 in 1988, 22,018 in 1989 and a projected 26,790 in 1990. About 75 percent of this traffic is coal.

INRD's employment has grown from 17 employees at start-up to 45 today. Further, in 1989 INRD invested about one million dollars of "internally" generated funds for capital expenditures.

Public Evidence

James M. Goodwine is President of the Palestine Chamber of Commerce. He presented a profile of the employment and economic impact on the community of the sale, and pointed to a loss of service when a local carrier, Prairie Central, substituted for ConRail, and eventualily abandoned its operations. The loss of 19 IC jobs at Palestine, with spouse employment, would exceed $1,286,000 annually. Moreover, railroad employees serve an important role in various community leadership positions.

Lyle Laughead is a farmer at Palestine, and a former IC engineer during the period 1968-77. He watched a short line fail to the north and the south, and fears the same will occur east and west if the IC line is sold. This price of his grain would be affected, because he must depend upon elevators with rail service to compete in the market.

Elaine Miller is the Crawford County Treasurer, and is opposed to the sale. The adverse affect to her County would flow from reduced revenues from taxes and fees, loss of income to families and their spending power. Also, the loss of rail service to the area would greatly impact the shippers, causing additional loss of revenue to the County.

Mervin D. Rich is supervisor for Honey Creek Township. The sale to INRD is opposed because IC has been in operation for 140 years and is viable. In case of INRD's failure, he fears no one would pick up the remains, as witness the impact of the Prairie Central collapse. Industries could not function properly if there is another cut back in service.

Vicky Hoisington is a member of the Robinson Community Unit #2 School Board, and strongly opposes the sale because it would have an adverse effect on the community, industry, and school system.

Owen M. Landrith is President and CEO for the Farmers State Bank of Palestine. IC has meant a lot to Palestine over the years. Farmers get more for their grain if loaded on rail cars, and industries in the area depend on IC for service and the industries provide jobs. He does not want another Penn Central and Prairie Central. He does not believe that INRD has provided satisfactory evidence that it has the capital and experience necessary to provide continuity of qualified management and service.

John Graves is President of Big Buck Lumber Company in Robinson, and supports continued IC service because of IC's financial strength. He receives about 12 to 15 cars of western spruce from British Columbia.

James Kincaid, on behalf of the Palestine Public library District, testifies that a viable railroad is important to the community, and that 90 percent of the library revenue comes from

taxes. He has confidence in the ability and strength of IC, but does not share that confidence with INRD.

[10] David Foote, a Robinson resident, testifies as to the poor economic situation that occurs when a town loses rail service. He refers to the loss of other rail service and believes that if there is one scintilla of a chance that INRD could fail or be sold for scrap, then the INRD sale should not be approved.

Steve McGahey, President of Tempco Products Co. in Robinson, states that the INRD is a gamble, and that he looks to the financial strength of IC, and the years IC has been in business. He relies upon a November 8, 1989 cautionary letter from the Illinois Department of Transportation refusing to support the application of INRD for his position. The loss of the only railroad serving Robinson would jeopardize competitiveness and job markets.

Kyle Fulling is a Palestine resident employed by the U.S. Department of Agriculture and is very familiar with railroad operations. He referred to comments several years ago made by INRD's President Hoback concerning his reputed "disdain" for moving grain, and that his railroad would stay away from TOFC and grain. Fulling states that the line between Sullivan and Lis in recent years was relaid with 115-lb. welded rail, but that maintenance requirements will become necessary in the future. He questions INRD's locomotive capability. He expresses concern that INRD may go the way of Gulf & Mississippi or Chicago, Missouri & Western, and hopes that IC's new management will prove better than the prior administration of that carrier.

Darrell Brown is Superintendent of Schools for Palestine District No. 3. He believes the sale and closing of the IC in Palestine would create an unstable atmosphere for the school district. A loss of 15 to 20 students would make it very difficult or impractical to offer advanced classes or maintain the

necessary curriculum. In addition state aid for the school district of $1,900 per student would be lost, and also the school district tax base would be decreased. The lowered valuation would place an additional burden on the school district if the Palestine terminal is closed.

Robert Waldrop is the Lamotte Township Supervisor. He makes certain economic calculations based upon a loss of 19 railroad jobs, but with a retention of 7 in the new operation. He calculates a total loss of $890,350 in annual spendable income if the sale takes place. He points out that these employees are part of the life of the community, and serves as Sunday School Superintendent, Township Auditor, Board Member, Church Trustees, Boy & Girl Scout Leaders, Village Treasurer, Chamber of Commerce and Prosper Committee Members, Civil Service volunteers, Village Clerk, and an Election Judge.

Paul Johnson is Manager of Willow Hill Grain, a country grain elevator at Willow Hill. About 90 percent of its grain is shipped by rail, which amounted to 490 cars in 1989, to processors, exporters and the southeast poultry industry. He receives 70 percent of his fertilizer by rail. He looks to operating experience and capital for a rail carrier, and says that lack of either will not overcome the best intentions. The company has used IC for 25 years, and does not want to give this up for anything less. A railroad without equipment, such as hoppers, flat cars and boxcars would be of no value. He is unaware of the effect that multiple carrier movement such as will result from this application (three or more rail carriers in a chain) would have upon his sales to the southeast poultry industry. For example, in order to reach Waynesboro, MS, Willow Hill could have a rail routing of INRD-IC-MidSouth-SouthRail. Elsewhere in this decision, it is noted that Hoosier Energy suports the application of INRD because it would reduce the number of

[11] number of carriers it must deal with, even though Hoosier uses CSXT and has no current plans to use INRD.

Fay Adams is Village President of Palestine. The community has a population of 1,800. The Village opposes the sale. It would mean possibly 19 empty homes, reduced taxes, and reduced spending in the Village. Most of the employees and their families are active in community affairs, churches, schools and other organizations.

Bill Misslap, retired patrolman for the Robinson Police Department, testifies that the area could not afford to lose another rail carrier. He is reminded of the pledges given by Craig Burroughs that there would be first class service through Robinson, but now he says the tracks have been torn up.

A number of the public witnesses fromn Robinson and Palestine express concern over the sale, but indicate a lack of personal expertise on railroad operations and finances sufficient to take a firm position. However, their testimony causes concern. Such somewhat neutral witnesses were John Fulling, employed by Rainbow & Son Elevator at Palestine (Tr. 89-90); Joe Blisse, Chairman of Crawford County Board (Ex. 9; Tr. 96-101), Don Donnay, President of the Robinson Chamber of Commerce (Ex. 20), Jerry Opiela, a Robinson resident speaking on behalf of CRAWPAC (Tr. 140-48), and James A. Ellis, president of a grain shipper at Palestine. (Ex. 13). Not appearing at all were two very important shippers at Robinson, Marathon Oil and Union Carbide.

It is clear that INRD lacks positive public suport for replacing IC in the Robinson-Palestine area. In this regard INRD already operates by an interchange "trackage rights" between Sullivan and Palestine, in the case of the Lis coal train.

Employee Evidence

Three IC employees, or their representatives, testify in opposition to the entire transaction, including the trackage rights. The testimony is directed to present and proposed operation of the rail properties, and also to the impact on IC employees if the various transactions are approved or exempted by the Commission.

Up to 20 IC positions would be abolished. A carman could not exercise seniority elsewhere. The other 19 positions involve people at Palestine. INRD intends to operate the Sullivan-Newton segment with eight employees. The Palestine crew will come from present INRD employees and maintenance of way will be performed by present INRD forces.

It is clear than the 19 persons employed at Palestine must move to follow any work opportunities with IC if the line is sold to INRD. These would be distant locations of Champaign, IL, Fulton, KY, or E. St. Louis, Il. Although INRD may hire former IC personnel, this is by no means assured. The 19 IC workers who might elect to exercise their seniority would "bump" those with lesser seniority elsewhere, with some one at the bottom losing his job, with potentially hundreds of employees also adversely affected in the process. IC's witness acknowledges that in the bumping process "someone falls out at the bottom." (Tr. 227). IC tries to offer severance payments to reduce the hardship, and also to minimize protective payments.

The impact upon IC employees is such that they would be required to leave Palestine to exercise their seniority, and somewhere 19 IC positions would be lost to junior IC employees at other locations. IC would attempt to minimize payments to those adversely affected by offering severance, [12] but 19 jobs would be lost somewhere on the system. Moreover, those IC employees who would be hired by INRD would suffer a substantial wage loss. The annual wage for IC train and engine employees is $57,550, whereas the INRD

wage scale of $12.25 per hour translates to approximately $24,000 per year. Another witness estimates INRD wages as $25,000 a year.

Other Evidence

The petition in F.D. No. 31472 requests exemption for the acquisition of the entire Sullivan-Browns line, yet a settlement agreement between IHRC and INRD and provides that the Newton-Browns segment will be immediately resold to IHRC, with the added effect that for some purposes INRD's stations between Palestine and Newton also will be stations on IHRC's line. For example, INRD would be a switching carrier for INRC in the case of grain traffic originating at points on the Newton Line and then moving over the Browns Line. In the case of other traffic originating on the Newton Line, INRD will act in its role as a line-haul carrier and will not be a switching carrier for IHRC. Thus, INRD partially would be a switching carrier for IHRC which also holds itself out as a switching carrier.

The INRD plan to sell the Newton-Browns line to IHRC was not made public until shortly prior to the hearing. The protestants were aware of local media statements attributed to IHRC personnel.

Counsel for INRD advised that a meeting was held with counsel for IHRC, along with Commission personnel sometime in November or December, 1989, at which the Commission staff are said to have advised the two carriers that the settlement agreement with resale to IHIRC, should be progressed at a later date. (Tr. 30-31).

INRD takes the position that the spinoff is not relevant to the instant proceeding. (Tr. 31-32). However, the issue under the circumstances is whether exemption is required from the provisions of 49 U.S.C. 11343. Clearly, a finding that an exemption is required cannot be made unless a related transac-

tion which is part and parcel thereof is shown to be warranted. Many but not all details of the related proceeding are of record.

The protestants take an adverse view of the meeting with Commission staff personnel. Counsel for the protestants were not invited but UTU at least did not file its protest until December 11, 1989 and may not have been a party at the time of the meeting. Nonetheless, protestants believe the Commission's entire process is tainted. Commission staff has an important instructional function especially in esoteric matters such as this. Not knowing when the meeting took place, I am unable to find that the protestants herein were improperly excluded.[9]

The public support for INRD's purchase of the Newton-Browns portion of the transaction is not based upon INRD operation, but upon the resale and operation by another carrier, IHRC. This is apparent from the evidence submitted by those situated on the Newton-Browns line. There are two "form" statements of support at Olney which do not men-
[13] tion IHRC[10] but all other supporting statements contain added material (in identical form) which condition the support upon resale to IHRC.

The only reservation about the INRD-IC purchase agreement comes from an interest on the Newton-Browns segment, the Olney Chamber which, judged by its statements, may not be aware of the INRD resale plan to IHRC. (Ex. 18).

The record is clear that there is no support for INRD's acquisitions of the Newton-Browns line, standing alone and apart

[9]Protestants believe the Commission should not let the matter rest on the present record. They think the word of INRD may not give the entire, or even correct statement of events. They believe the Commission owes an explanation to the public and, in particular, a statement as to acceptable practices in dealing with similar situations.

[10]One spokesman for these two individuals testifies that their support is predicated upon IHRC operation, and that the Newton-Browns line must be upgraded. (Tr. 81).

from a resale to IHRC. If, as asserted by INRD, its acquisition of the Newton-Browns line is independent of the resale, then there is no foundation for a finding that exemption is required, as the proof does not support any independent acquisition.

INRD's petition for exemption asserts that regional and local transportation systems and patterns will not be significantly affected by the transaction, train service (on the Indianapolis Line) will continue at current levels, and IC's operation on its remaining lines will not be changed significantly (*Pet.*, pp. 14-14).

It is apparent that there will be some changes in the railroad traffic patterns as a result of the INRD-IHRC settlement agreement but that no significant changes will occur. For example, a major coal movement envisioned by IHRC in its November 6, 1989 protest, at p. 7, and in the verified sttement of IHRC's President Felix, filed November 9, 1989, at p. 6, may be a possibility but will not add to overall coal traffic and cannot happen without an upgrade of the Newton-Browns track.

An additional change, also anticipatory results is the proposed naming of INRD Palestine-Newton stations as IHRC stations for the purpose of grain traffic. There also would be a restriction against the transportation of whole grain or fertilizer traffic by INRD on the Newton-Browns line. As noted previously, INRD does not even plan to operate over the Browns Line. The fact that it will retain a limited trackage right thereover after the resale to IHRC appears merely to be only a protection measure.

The Sullivan-Newton line is in good condition, with 35 m.p.h. speed limitation. The line between Newton and Browns is generally restricted to 10 m.p.h. but will receive the traffic from IHRC and from INRD under the switching agreement. Outside governement funds will be necessary for rehabilitation of the Browns Line by IHRC.

INRD operates a 111-mile line between Indianapolis and Sullivan, and in late 1989 acquired by lease a 39-mile line between Indianapolis and Tipton. The question of INRD's viability was raised by a major utility in INRD s most recent extension to Tipton. *See:* F.D. No. 31464, *Indiana Rail Road Company — Lease and Operation Exemption — Norfolk and Western Railway Company* (served July 10, 1989), at p. 1 (Ex. 28, Ex. 2, p. 1, n.1). However, the extension was granted. Moreover, INRD's financial ability to undertake the substantial purchase need not be derailed by its working capital deficit of around $700,000 on July 31, 1989. In a post-hearing evidentiary submission dated May 18, 1990, hereby received in part, INRD says that it has invested $700,000 in the subject transaction [14] accounting for all of the working capital deficit. This recent fiscal year 1989 data possibly does not account for its Indianapolis-Tipton undertaking, or for all of that proposed herein. Nonetheless, INRD's proposal is to sell the Newton-Browns line for $1 million, with financing for the payment of $5 million to IC already in place and a return of $1 million of that from IHRC. INRD is positioned to consummate this transaction.

Of course, INRD did not submit its business plan for the proposed acquisition, but plainly INRD is not required to come forward with all of the information necessary to sustain the burden of proof anticipated in a regular non-exempt Class I carrier type acquisition proceeding. However, INRD also waited until May 1, 1990 to come forward with anything, and that was merely a petition for a protective order for the 1989 year. (fiscal year ending 7/13/89) causing great difficulty at the public hearing on May 2, 1990.

INRD appears to be a highly leveraged financial structure. It will incur an additional $5 million in debt from this transaction and is not absolutely assured of the $1,000,000 on resale of the Browns Line to IHRC. INRD has no visible car supply, and must secure cars from its connections, or force the shippers to find cars from some leasing agency. (Tr. 40-41, Ex.

28, pp. 6-7). IC specifically has agreed to furnish equipment only to Marathon and Union Carbide.[11] The only other car contract between IC and INRD provides for grain hopper cars on an availability basis. (Ex. 33, Ex. G, pp. 1-2):

> "IC agrees to retain in effect the existing open hopper car assignment with Marathon Oil Co. at Robinson, IL, said assignment to cover up to two hundred fifty (250) open hopper cards. IC also agrees to retain in effect the existing covered hopper car assignment with Union Carbide Corporation at Robinson, IL said assignment to cover up to one hundred eight (108) 100 ton covered hopper cars. IC will further provide INDIANA with grain hoppers on an order basis, subject to availability."

INRD has no experience with car supply for smaller shippers (Tr. 72-74). IC certianly will prefer its own on-line shippers in the event of a car shortage. Moreover, those cars which are supplied by IC are to be routed loaded via IC, and not necessarily to CSX, IHRC, Conrail or NS all of which connect with INRD. IC's agreement with INRD provides (Ex. 33, Ex. G, p. 3):

> "All Cars subject to this Agreement are supplied to Indiana for the primary purpose of handling loads back to or via the IC Indiana agrees to use the Cars for such purpose. In addition, as to grain hoppers, they shall continue to be routed as presently moved over the IC system. In the event Indiana shall fail to do so without prior approval from IC, IC may terminate this agreement upon two (2) days written notice to INDIANA."

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[11]The absence of Marathon and Union Carbide from the hearing does not go unnoticed. Of course, as mentioned at the outset, there is no affirmative support for INRD's takeover in the Robinson-Palestine area.

[15] Notwithstanding all of these significant negatives, some cars will be available from IC and other carriers such as IHRC.

Two major coal shippers submitted statements. Both support the application. Hoosier Energy, at Merom, is situated 4.5 miles west of Sullivan, and is served by CSXT which has trackage rights over the line. (Tr. 57-59). Hoosier seeks an additional option for its traffic. With the purchase, INRC potentially will be able to provide single-line service on coal traffic for Hoosier from Linton, but no details are provided. Central Illinois Public Service Company (CIPS) supports the sale, having shipped 6,500 carloads of coal over the involved line in 1989. Presently, INRD interchanges with IC at Palestine. Even though the proposed INRD operation into the Lis facility combined with local movements of cars in and out of the Robinson-CIPS area could create inefficiencies, CIPS still supports the application but has no complaint with the existing operation.

The INRD coal movement trackage rights to Lis is restricted to coal, limestone or other fossil fuels which originate in mines in the state of Indiana and states east thereof, but not including Kentucky. This excludes western coal and limits the future ability of INRD to serve CIPS. The present movement of coal into Lis is by a coordinated service involving both INRD and IC at Palestine.

There are some 40 shippers situated on the involved line, and only a few actually support or oppose the application. Clearly, INRD has done too little to convince the public that the INRD operation would promote the interest of the involved area, but the shipping public basically appear unconcerned except those on the Browns Line who support IHRC.

Discussion and Conclusions

INRD has the burden of proof for the purchase aplication in F.D. No. 31472. It asks that its petition for exemption be

considered without regard to the proposed almost immediate spinoff of the Newton-Browns segment, and other arrangements contemplated by the INRD-IHRC settlement agreement. The Commission cannot ignore the transfer and settlement agreement, particularly because under the interim trackage rights arrangements, INRD and IHRC have contracted for IHRC operation.

The instant INRD application, even with the settlement agreement, is not anti-competitive. There are some limitations under the various resulting trackage rights but the basic purchase proposal for Sullivan-Newton and Newton-Browns could result in new carrier options or at least no curtailment of options for one of the two coal shippers on the Sullivan-Newton line and in improved IHRC service on the Newton-Browns line.

The Commission still will be required to give consideration to the implementation of the settlement agreement when the application of IHRC is actually filed with the Commission but even prior thereto IHRC can commence operation over the Newton-Browns segment under the trackage rights class exemption. The evidence establishes that IC does not want to operate the subject lines, particularly the Newton-Browns segment. Protestants note that IC has superior locomotives, cars, and other equipment, and has better maintenance capabilities. IC is said to have car supply, whereas INRD has no car supply. Also, protestants say that the present manner of handling coal traffic into CIPS at Lis with an IC and INRD interchange at Palestine is very efficient, and that it would be less efficient for both IC and INRD to operate into and out of Lis. However, CIPS, the coal shipper at Lis supports the application. Moreover, even though INRD lacks cars, it does [16] have capabilities similar to IC in the other areas mentioned by protestants. It is true that the claim for better operation of the Newton-Browns line by IHRC depends upon fun-

ding to upgrade the Newton-Browns segment. Under IC, the track is limited to a 10 m.p.h. operation. Considering the importance of the line to IHRC, the necessary rehabilitation appears likely. In any event, the present IC operations over the Newton-Brown segment is not tolerable according to the evidence herein. IC provides daily service at Olney, and alternate day service north and south thereof over the Newton-Browns segment but appears to have no interest in the line.

The matter of safety is present. The Marathon facility can be hazardous. IC has experienced crews and has proper equipment. However, Marathon is well aware of the application of INRC and chose not to oppose the application. Its stance of neutrality indicates that the safety of INRC proposed operation at its Robinson plant will be dealt with by Marathon and INRD.

Regulation of the transaction does not appear necessary to prevent market abuse. There are at least four major movements (coal, grain, coke — for Marathon and chemicals — for Union Carbide). As explained, the coal movement will not eliminate service options presently existing, even though there are some restrictions and no new coal movements are anticipated.

Grain shippers basically will receive the same indifferent IC car supply as before, but augmentation of service may be provided by IHRC. Also, INRD will be able to offer additional line-haul outlets for grain via carriers such as NS and CSX in addition to IC and IHRC, assuming it can get cars.

Finally, it appears that INRD has made its deal with Marathon and Union Carbide. These shippers have the financial statement of INRD. Further, IC agrees to provide cars for their use. The shippers are well aware of this application and do not object.

There is an issue concerning the final two paragraphs of Ex. 15, the verified statement of R. Powell Felix the owner of IHRC. During the morning session of the hearing at Robinson he spoke from the audience but left the hearing early and did not stand for cross-examination on his statement. This is unfortunate, but even without the disputed portions of his statement (the last two paragraphs) there is considerable information herein concerning the Newton-Browns segment.

As a regional railroad, INRD does not compete in the long-haul transportation market and is thus believes that it is in a position to provide its shippers with neutral access to Conrail, CSX, Soo, NS, and IC. This increased access to long-haul carriers could introduce additional competition into the transportation markets available to shippers on the lines, but can happen only if these carriers provide cars to INRD. None of these carriers appear here other than IC, which demands that its cars move over its own lines.

Exemption of this transaction also will expedite Federal regulatory approval of the transaction. Failure to exempt this transaction would require INRD to file a formal application before the Commission in which it would supply essentially the same information it has supplied in connection with this exemption petition. Of course, on July 30, 1990, INRD's purchase contract with IC will expire unless extended.

The proposed transaction need not engender an unsafe rail transportation system, but INRD is able to provide only "bare [17] bones" service on the lines because of its few employees and low wage structure.

The proposed transaction could promote effective competition among rail carriers. By providing shippers with neutral access to five major connecting carriers, the transaction introduces a new competitive element into the transportation

markets available to these shippers. However, no Sullivan-Newton shipper appears to agree.[12] Basically, INRD will be captive, as at present, to IC because that carrier is the only source of guaranteed cars and such cars must operate over IC.

Protestant adduced evidence as of the end of July 1989 INRD has a working capital deficit of some $700,000 at the end of 1989 (Tr. at 49).

Simply comparing INRD, the potential acquirer of the lines, with IC the current owner, shows that in a variety of measures of financial viability, INRD compares very favorably to IC. To the extent that working capital deficit has bearing on financial viability, IC's working capital deficit as of the end of 1989 was $72,802,000. IC's working capital deficit is almost equal to its total shareholders equity. INRD's $700,000 working capital deficit as of the end of July 1989 is less than 25 percent of its shareholdlers equity. (Protestants object to consideration of this information because some of it was supplied post-hearing. However, the new information is taken from public documents and should be received. Other post-hearing information supplied by INRD relative to additional rail carriers is rejected as not relevant).

With its brief, INRD submits a supplemental veriefied statement of Mr. Hoback, hereby received, which explains one of the principal cause of the working capital deficit as of the end of July 1989. He says that expenses incurred in preparation for this transaction account for most of it. By the end of July 1989, INRD had deposited $100,000 with IC on this transaction. It has spent $300,000 for the four additional locomotives which are said to be needed to serve the additional business that will result from acquisition of the subject lines, although

[12]Without the acquisitiion proposed here, INRD still could obtain trackage rights to serve the CIPS and Hoosier plants.

as noted previously, all of them already are being used in the existing operations of INRD, which includes service as far west as Palestine for Lis coal traffic. Finally INRD incurred legal expenses in connection with concluding the agreement with IC.

Subsequent to its July 1989 financial statement, INRD incurred additional expenses in connection with this transaction including costs associated with obtaining new financing and the additional legal expenses associated with obtaining regulatory approval of the transaction. Total out of pocket costs caused by this proposed transaction amount to approximately $600,000. These costs have been paid from INRD's cash flow and have not yet resulted in any additional revenues to INRD.

The record is not absolute but tends to demonstrate that the financial condition of INRD is sound. Mr. Hoback testifies about that condition and the changes that have occurred over the years INRD has been operating. Mr. Hoback pointed to several indicators of INRD's financial viability including the fact that it has been profitable on a GAAP basis in every month of its operation since start-up, with the exception of two. In 1989 INRD paid income tax in excess of $160,000, and in 1989 [18] and each of the preceding two years made a provision for income tax substantially in excess of that actually paid in 1989.

Also, in 1989 INRD generated sufficient cash from railroad operating activities to pay for its investment of almost $1 million in capital expenditures on the railroad and to repay $450,000 of debt principal.

Additionally, as of the end of July 1989 shareholder's equity exceeded $2 million and was almost $3 million if a subordinated loan by the shareholders to INRD was counted as equity.

Further, concerning viability the Indiana National Bank

recently refinanced INRD on a more favorable basis than INRD's original financing. The Bank has purchased a first note with a principal of $3.3 million and has committed to purchase a second note with a principal of $5 million to finance the acquisition of the subject line. Even with the additional debt, INRD's shareholder's equity a long term debt ratio (using year end 1989 shareholder's equity numbers) will be approximately 1 to 2.7 after this transaction is consummated. The comparable ratio of shareholder's equity to long term debt (including equipment obligations and capitalized lease obligations) disclosed by IC's 1989 R-1 is 1 to 6.47.

With all of the foregoing, it still cannot be absolutely concluded that INRD is profitable and that its cash flow is adequate to meet its capital program and debt service. Whatever, financing is in place which will permit it to acquire the subject lines. It has a minimal cost structure, there is an abundance of traffic, the Sullivan-Newton line is in relatively good condition, and IHRC wants the poor Browns Line which may have unrealized traffic potential.

As noted in Mr. Hoback's testimony (Tr. 35) INRD plans to take early action to make repairs on the Newton Line particularly to the yard at Palestine and to the yard at Robinson. This will improve safety on the line, and tend to compensate somewhat for the less powerful locomotives and reduced work force of INRD.

It is clear that the principal (though not the only) reasons for the application and the opposition to this transaction comes from the proposed removal of the 19 or 20 IC employees on the subject lines and the communities in which they live. Only one of those employees will lose employment and he will be compensated with severance pay as is required by the *New York Dock* conditions.

It needs to be noted that this is a transaction that, in the absence of exemption, would have to be considered under 49 U.S.C. § 11343. In all such transactions, labor protection is mandatory and the Commission must impose on a line sale transaction such as this, *New York Dock* labor protection. Thus, each of the employees on the lines will be guaranteed against any adverse effects of this transaction for a period of six years. This protection extends both to wages and to fringe benefits.

Indeed, the IC has offered 18 of the 19 employees on the line employment at other points on the IC system. As Mr. Richter explained in his testimony (Tr. 217):

> For the 19 employees involved, the critical [should be "clerical"] employee will have the right to exercise his seniority to any position on the system from Chicago to New Orleans. The maintenance-of-way [19] employees have the right to exercise their seniority on jobs in the northern half of the railroad and the train [and] engine service employees would have the right to exercise their seniority to position[s] on seniority district three. On seniority district three, while they may bump various people, under the collective bargaining agreements, both the trainmen and the engine service people have positions available to them so no one will be put out on the street. At the present time, the clerical employees, we have vacancies for clerical employees as well as maintenance-of-way employees.

Thus, IC has positions available for all but one employees on the lines, and to the extent that they incur additional costs (such as moving expense) resulting from the line sale, the employees will be compensated pursuant to the provisions of *New York Dock*. IC does have employment opportunities available, at wage levels and with working conditions and work rules similar to those under which the employees are presently

employed, albeit at different locations on the IC system. This transaction will permit IC to move its employees on the lines to locations where they will be more fully deployed at their existing wage and benefit rates.

The efffect on the Robinson-Palestine area communities will be drastic, but the public interest over the long term may be more favorable. The record shows that IC continually has reduced its operation and work force at Palestine. INRD offers a bare bottom to the long-term IC reduction in-force process.

Section 10105 provides for exemption if the transaction is one of limited scope or there is no need to protect shippers from abused market power. 49 U.S.C. § 10505(a)(2)(A). The proposed transaction involves the acquisition of approximately 90 miles of rail line and related facilities connecting to two or three utilities and at least three other major shippers. This, in my opinion, is not of limited scope, even though some transactions with somewhat similar characteristics may have been deemed by the Commission to be limited in scope. In any event, in my opinion, the alternative ground for exemption, absence of potential for abuse of market power, is present.

As a final note under the settlement agreement, INRD has of course agreed to sell the Browns Line to IHRC for $1 million. IHRC has agreed to grant back trackage rights to INRD over the Browns Line that technically will permit INRD to serve shippers between Newton and Grayville. As noted, this is not like nor anticipated. Instead IHRC, INRD and IC have entered into a switching and interchange agreement whereby INRD's Newton switching district will be extended to Palestine and INRD will publish a switching tariff that will permit IHRC to use INRD to switch traffic to grain customers on the Newton Line. Under this arrangement, in addition to having the potential routing options described above (INRD-CSXT, INRD-IC,

INRD-Conrail, INRD-NS, INRD Soo) grain shippers on the Newton Line will also have the option of IHRC movements as well. Similarly, because INRD will have inchoate trackage rights over the Browns Line, shippers on the Browns Line will have a possible fallback on INRD.

Because it will be able to access grain shippers on the Newton Line to originate traffic, IHRC will have an incentive to use its grain cars to meet the need of grain shippers on the line. Further, the transaction will give grain shippers on the [20] Newton Line access to barge service at the port of Henderson, KY which is served by IHRC.

If a simultaneous closing of the transactions is not possible (as appears will not be the case) INRD and IHRC have entered into an interim trackage rights agreement that will permit IHRC to operate over the Brown Line from the date INRD acquires that line. Shippers on the Browns Line will thus benefit from the presence of IHIRC from the date of closing of this transaction. INRD represents that a notice of exemption for that trackage rights agreement will be filed at least seven days before closing on this transaction.

I conclude that INRD's acquisition of the Newton Line and the Browns Line in this transaction in balance will somewhat increase competitive options of shippers on the lines. Grain shippers will have potential rail access to markets on IHRC, Conrail, CSXT, Norfolk Southern, Soo and continued access to IC. Coal shippers also will not lose routing options. INRD demonstrates its ability to provide service on volume traffic. INRD is profitable and its cash flow is strong.

The traffic base and the track condition over the Newton Line are good. There is no immediate damages of termination of the Newton operation even with a bankruptcy of INRD. If this transaction were being considered as a Class I rail trans-

action, the Commission might wish to deny it because there is scant evidence of any public interest. Basically, INRD shows little in the way of public interest in the application except for potential IHRC restoration of the Browns segment. At the same time INRD proposes a drastic curtailment in worker wages and employment. I do not believe that the record supports a finding that IC employees are overpaid or that they are more than marginally excessive. Such may be debated, but basically the record shows only that INRD will attempt to do with three new workers that which IC inadequately does with 19 or 20.

However, the transaction is not one involving Class I rail carriers and as the attached memorandum of the Commission's Office of Transportation Analysis indicates, the policy of the Commission is not to broadly weigh the public interest in matters such as this (see page 4 of the appendix). As stated in the Appendix, the Commission applies a presumption that transactions such as this are in the public interest and allows for denial only if protestants show anticompetitive effects (see page 14).

Nonetheless, the National Transportation Policy (NTP) must be given specific consideration in an exemption proceeding. Because the NTP is not mentioned at all in the case of a more formal section 11344(d) proceeding, argument can be made that the exemption process should be no more difficult than the regular non-exempt application process under section 11344(d) and that, therefore, little or only passing attention need be given to the NTP in an exemption case. In my opinion, the reverse is true. The regular application process should consider the NTP as should the exemption process. Indeed, any section 11344(d) application which transgresses the NTP should be denied even though the statute is technically satisfied.

In considering the NTP, a rounds system, as in boxing, is not appropriate. Instead, each element must be weighed, and, in effect and measured as in the "points" system of determining the outcome of a fight. One factor, for example, the effect on working conditions, might be graded high and deemed controlling when the other NTP factors are neutral or nonexistent. Here, for example, I believe that the Commission should conclude that the subject transaction has no substantial purpose other than employee removal, and deny the [21] application on the basis of a breach of the NTP. In this regard, it should be noted that applicant offers no convincing proof that there is a transportation need for its proposed service.

In the attached memorandum, OTA takes the view that such evidence is not relevant. Conceptually, I disagree with the view stated by OTA, in that I would not, by choice, take a narrow view of the public interest. However, I agree that a constricted view seemingly is required by section 11344(d) which presupposes that an applicant will meet significant transportation need. Unfortunately, without a rational application of the NTP, applicant will succeed in using the eased acquisition standars in a manner never intended by Congress. The Sullivan-Newton line is not failing. Instead it is a sound line better operated by IC than by INRD, with no real acquisition purpose other than mass employee removal in violation of the NTP. Also, the purchase and resale of the Browns line to IHRC can be accomplished directly by IC and IHRC in an orderly manner. Stated simply, even though I agree with INRD that INRD operation of the Sullivan-Newton segment and INRD resale of the Newton-Browns segment will not result in an abuse of market power or a substantial lessening of competition, I do find a substantial abuse of the NTP and the Commission's application and exemption procedures.

FINDINGS AND ORDER

In F.D. No. 31472, I find that the proposed acquisition will not result in an abuse of market power, but that the transaction is contrary to the National Rail Transportation Policy and that the application for exemption should be and it is denied.

In F.D. No. 31485, I find that exemption of the acquisition of trackage right also will not result in an abuse of market power, but that the transactions are contrary to the National Rail Transportation Policy and that the unexercised exemptions should be and they are revoked.

By Paul S. Cross, Administrative Law Judge, on the 30th day of May, 1990.

Noreta R. McGee
Secretary

(SEAL)

APPENDIX

INTERSTATE COMMERCE COMMISSION

MEMORANDUM

MAY 23 1990

TO : Paul S. Cross, Chief Administrative Law Judge Office of Transportation Analysis

FROM : Office of Transportation Analysis

SUBJECT : F.D. No. 31472, Indiana Rail Road Company — Petition for Exemption — Acquisition and Operation — Illinois Central Railroad Company — Line Between Sullivan, IN and Browns, IL, et al.

Introduction and Executive Summary

This responds to a request from the Office of Proceedings for comments on this proceeding involving the sale of approximately 90 miles of Illinois Central Railroad Company (IC) line in Indiana and Illinois to Indiana Rail Road Company (IRRC), a class III carrier. IRRC has structured its request as a petition for exemption from 49 U.S.C. 11343 *et seq.*[1] The United Transportation Union (UTU) has protested, arguing that the transaction is "major" rather than of "limited scope" and that

[1]In addition to this sale, the two railroads have entered into an interchange agreement and two trackage rights agreements. IRRC has filed a separate notice of exemption for the trackage rights agreements (F.D. No. 31485). One of these agreements assigns to IRRC IC's trackage rights over a 11.2 mile segment of Indiana Hi-Rail Corp. lines. IRRC asks that if this assignment does not come within the scope of the Commission's class exemption for within the scope of the Commission's class exemption for trackage rights, the Comission treat the instant petition as covering the agreement assigning trackage rights.

there is a "serious concern for 'market abuse.'" The UTU essentially claims that the possibility of market abuse arises because the management of IRRC has a poor track record, [2] that there is reason to doubt IRRC's post-transaction financial viability, and that the failure of IRRC would have an adverse impact on competition.[2]

A "financial viability" assessment provides information concerning the likelihood that a proposed rail control transaction will result in bankruptcy (or in other forms of financial stress, such as voluntary debt restructuring). But, even knowledge that a proposed transaction could result in bannkruptcy is not sufficient to determine what will be the impact of that transaction on competition. For that, we need to know the result of the bankruptcy. Will service continue via a reorganization or sale to a new owner, or will service end via liquidation? If service will continue, then there can be *no* permanent adverse impact on competition, although there may, of course, be a temporary one if service is interrupted. In this case, we say, with respect to the rail line(s) at issue, that there is "economic viability" or "competitive viability," despite the lack of financial viability for the controlling firm. If service is unlikely to continue, then there *may* be an adverse impact on competition — the question must be investigated. In this case, we say there is no economic viability or competitive viability.

Since the UTU has made only a case that there may be no financial viability, it has not shown that the transaction [3] threatens competitive harm. Therefore, we recommend rejecting this UTU argument.

Below, we evaluate the UTU argument concerning competitive harm in greater detail. First, however, we define the three types of viability and discuss their interrelationships. In

[2]The UTU also makes other arguments that are not pertinent here.

addition to aiding in the analysis in this specific case, this summary should be a useful general reference since it is likely that the Commission will have to address similar arguments in the future.

Background

This proceeding is structured as a petition for exemption, under 49 U.S.C. 10505,[3] from 49 U.S.C. 11343 *et seq.* In its January 31, 1990 request, the Office of Proceedings noted that

> [s]ince this proceeding does not involve two Class I carriers, section 11344(d) only requires an analysis of competitive effects of such transaction, and we need not concern ourselves with financial viability of IRR.

[4] Indeed, the Commission *cannot* concern itself with financial viability for its own sake when applying that part of the statute from which an exemption is sought in this current proceeding;[4] section 11344(d) states:

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[3]This section states in part:

(a) . . . the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle-

> (1) is not necessary to carry out the transportation policy of sectionn 10101a of this title; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers form the abuse of market power.

[4]In F.D. No. 31522, *Rio Grande Industries, Inc. et al. — Purchase and Trackage Rights — Chicago, Missouri & Western Railway Company Line Between St. Louis, MO and Chicago, IL,* served September 29, 1989, the Commission stated (at p. 979):

> The decisional criteria applicable to this transaction in § 11344(d) do not require a finding about fixed charges or other financial aspects of the transaction. See 49 U.S.C.

> (d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the Commision, the Commission *shall approve* such an application *unless* it finds that —
>
> (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation or a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and
>
> (2) The anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs. (emphasis added)

The Commission's past applications of this section have held that any findings of competitive harm under 11344(d)(1) must [5] be both "likely" and "substantial" in order to trigger the potential public interest balancing of 11344(d)(2).[5]

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§ 11344(d)(2). Indeed, we must approve a transaction under this provision unless we find that "there is likely to be a substantial lessening of competition," or similar anticompetitive impact, not outweighed by other public benefits. Accordingly, the concern of KCS about debt is relevant only insofar as that debt may cause a serious diminishment or elimination of competition.

[5] *See* F.D. No. 31522, *Rio Grande Industries, Inc., et al., — Purchase and Trackage Rights — Chicago, Missouri & Western Railway Company Line Between St. Louis, MO and Chicago, IL*, 5 I.C.C.2d 952 (1989).

Examples of adverse competitive impacts are: the likelihood of significantly higher rates charged to shippers, significantly worsened service quality, or the likelihood of a combination of higher rates and poorer service. A showing of expected substantial harm to a particular *competitor* as a result of a transaction does not show harm to *competition*. For example, a rail or truck competitor might lose traffic precisely because a transaction promises the significant public *benefit* of a new, improved transport

In its petition, however, the UTU has attempted to *link* financial viability to the required competitive assessment by essentially arguing that the financial failure of IRRC will necessarily result in competitive harm. Therefore, the Office of Proceedings has asked

> [i]n the event IRR were to go bankrupt shortly after the purchase of the line in question, however, we would like to know what effects, if any, there would be upon competition. As a result, please advise as to what impact the cessation of operations by IRR would have upon competition in the area pursuant to the standards of section 11344(d).

Analysis

The argument made by the UTU that a lack of financial viability will cause competitive harm rests on a confusion of [6] differing types of viability. When these distinct types of viability are properly distinguished, it is clear that a lack of financial viability cannot by itself cause competitive harm. Therefore, this UTU argument should be rejected.

1. Types of Viability.

We can identify three types of viability that are important in analyzing financial transactions:

> *Financial Viability (FV)* Revenues earned enable firm to cover variable costs and all non-variable costs, including fixed financial commitments such as interest payments on debt. These non-variable costs are covered whether or not they are necessary, efficient expenditures.

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alternative that shippers will switch to. In this event, the harm to the competitor would not be grounds for rejecting the proposed transaction. The concern is protecting competition, not protecting the interest of particular competitors.

Economic Viability (EV) Revenues earned enable firm to cover variable costs and all necessary, efficient non-variable costs. This means that in the long run all used and useful capital can be financed and replaced, and that the firm earns at least "normal" economic profits.

Competitive Viability (CV) Revenues earned enable firm to cover variable costs and any necessary, efficient non-variable costs that must be incurred in the short-run. This means that continued operation in the short-run is more profitable than ceasing operation. When physical capital whose cost is not being recouped is exhausted, however, a prudently managed firm would choose to reduce or discontinue operations in lieu of incurring expenditures required to retain or replace that physical capital.

We focus on FV for *financial assessments*. By definition, a lack of FV implies financial distress and, if voluntary agreements cannot be reached with debt holders, perhaps bankruptcy. When inquiring into whether a firm has FV, attention centers on financing arrangements arising out of [7] whatever investment and operational decisions have been made. Typically, market and credit analyses are done to determine whether, or under what conditions, financial distress or bankruptcy can be expected. Generally, the central question is whether cash from operations is sufficient to make required payments to debt holders.

When viability is an issue in *competitive assessments*, however, the focus is properly on EV and CV.[6] This is because in competitive assessments the relevant question is

[6]We have defined FV, EV, and CV to apply to firms as a whole. Of course, EV and CV can also be applied to parts of firms, such as to the rail operations of a corporation that also engages in non-rail activities, or to specific rail lines.

whether the capacity of the firm being evaluated will remain in its current use and continue to provide effective competitive service to shippers, or whether that capacity will exit the market. It is the exit of independently controlled assets and the service they provide that can reduce competition. A finding of no FV, however, does not, by itself, reveal whether or not service will continue. The result of a bankruptcy may be (1) successful reorganization or sale of the firm to a new [8] owner,[7] or (2) liquidation. A determination of EV or CV indicates which outcome will ensue. Accordingly, we focus on EV and CV for competitive assessments including that called for under section 11344(d).

With EV and CV, attention centers not on financing arrangements but on the underlying investment and operational choices. EV and CV *presume* optimal investment decisions and efficient operations. The questions to be answered are if the firm is efficiently run, would it earn at least normal profits (EV), and, if the firm is efficiently run, would it at least cover its near-term (operating) costs (CV). If a proposed transaction may result in a lack of EV or CV, then true exit may occur and there is a possibility of competitive harm. In this situation, we would go on to investigate the extent to which the likelihood of exit is *increased* by a proposed transaction, and

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[7]Using different terminology, F.M. Scherer notes that this is not uncommon:

> The financial reorganization following a bankruptcy plea seldom entails the outright dismantling of technically efficient production facilities. Rather, the plants are normally acquired at bargain prices by another solvent firm, which sooner or later restores them to operation, burdened by much lower capital charges.

(*Industrial Market Structure and Industrial Performance*, Houghton Mifflin Company, second edition, 1980, at p. 214.)

the extent to which it would harm competition.[8]

An example will help illustrate the distinction between FV and EV/CV and relate viability findings to the different outcomes [9] that can occur when a railroad does go bankrupt. Suppose new owners take over a railroad and finance their purchase largely by borrowing money. Their forecasts of operating revenues and costs are not met and, after operating for a short time, they are not able to make the required debt payments and the railroad enters bankruptcy. If another purchaser is able to take over the railroad — paying a much lower price — and operate it successfully, then we would conclude that, under the first group of buyers, the railroad *was not* FV but *was* EV or at least CV. Alternatively, if no new purchasers come forward and the railroad cannot be reorganized under the first group of buyers, then service ends and we would conclude that the railroad was *not* FV and also *not* EV/CV.

There are no simple causal links that define the relationship between FV and the two concepts of EV and CV. For example, a firm may be FV but not EV. That is, a firm may face no cash flow or other financial difficulties (it may even have no debt at all), but it may be unable to achieve normal profits. Such a firm will eventually cease operations as owners

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[8]Within such an investigation opponents of the proposed transaction must show that the proposed change inn control has *increased* the likelihood that the line(s) will be withdrawn from service *and* that the withdrawal will lead to a substantial lessening of competition. In the February 1989 Report to Congress by the Federal Railroad Administration, *Deferred Maintenance and Delayed Capital Improvements on Class II and Class III Railroads*, FRA concluded that, in general, line sales from Class I to smaller railroads have *decreased* the likelihood that those lines would be withdrawn from service. FRA stated:

> By acquiring and operating light density lines that no longer fit the economics of the large carriers, small railroads have preserved service on lines which would likely have been abandoned and torn from the ground a decade ago. (at p. i)

withdraw their equity or refuse to contribute additional equity. Similarly, a firm may be EV (or CV) but not FV. That is, a firm might be able to achieve normal profits if sensibly configured and run, but be unable to survive in its current situation because past management decisions have saddled it with large, fixed debt payments.

[10] The distinction we have drawn between the concepts of FV and EV/CV is also employed by the Department of Justice (DOJ), although DOJ does not use the exact terminology we have defined here. The issue arises in mergers involving the "failing firm doctrine." This antitrust doctrine says that a consolidation that would otherwise be disallowed as anticompetitive may be approved if one party to it is a "failing firm."[9] A firm involved in a proposed merger is *only* considered a failing firm, however, if three conditions are met: (1) it is unable to meet its financial obligations in the near future; (2) it is unlikely to be able to reorganize successfully under Chapter XI of the Bankruptcy Act and thus will probably be forced into liquidation; and (3) it has been unable to arrange an alternative consolidation which would both keep its physical assets in the market and pose a lesser threat to competition than the proposed transaction.[10] These conditions mean that to be considered a failing firm and have the doctrine applied, it is necessary that not only would the firm's current corporate shell exit from its market, but its *assets* and *productive capacity* would exit as well, absent approval of the proposed tran-

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[9]The failing firm defense for a consolidation is defined in section 5 of the U.S. Department of Justice Merger Guidelines. The Commission applied the failing firm doctrine in Docket No. MC-F-18505, *GLI Acquisition Company — Purchase — Trailways Lines, Inc.; GLI Acquisition Company — Control — Continental Panhandle Lines, Inc.* (*Greyhound - Trailways*), served June 7, 1988.

[10]*See* the DOJ Merger Guidelines, section 5, and *Greyhound - Trailways*, at p. 11.

[11] saction. That is, using our terminology, to qualify as a failing firm there must be both a lack of FV and a lack of CV.[11] Only when this is so is it certain that the proposed merger cannot have an anticompetitive impact. Thus, the DOJ Merger Guidelines conclude that the assets of a firm that lacks FV but which has CV (and which would continue to be operated under bankruptcy statutes) offer effective competition to other firms.

Thus far, we have not emphasized the distinction between EV and CV. EV is a stronger condition than CV in the sense that if a firm is able to cover its *total* necessary, efficient costs, then it will automatically be covering that part of those costs incurred in the short-run.[12] Applied to railroads, a finding of Ev is equivalent to a finding of revenue adequacy. When a firm is found only CV but not EV, then *eventual* exit is implied. When the capital whose cost is not being recovered is [12] exhausted, a prudently managed firm will choose to reduce or discontinue operations.

In practice, however, when a railroad has appeared to be CV but not EV, the Commission has often judged that the CV was a sufficient indication othat service will continue.[13] Rail

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[11]More precisely, the condition is that the firm must not be competitively viable *unless* it is consolidated with its proposed partner. The Commission made such a finding in its decision approving the consolidation of Greyhound and Trailways Lines, stating:

> The Commission therefore does not have as an alternative in this proceeding the preservation of Trailways (or its assets and overall operations under new ownership) as a significant viable competitor to Greyhound. Accordingly, this application provides the only available means for assuring continued operation of all of the Trailways' route network. (*Greyhound - Trailways* at p. 13)

[12]Thus, EV implies CV, and a lack of CV implies a lack of EV.

[13]For example, in F.D. No. 32000, *Rio Grande Industries, Inc., SPTC Holding, Inc., and the Denver and Rio Grande Western Railroad Com-*

firms may be able to operate for long periods before long-lasting assets are worn out. In addition, we know that owners and lenders have been willing to invest in rail systems when past returns indicate lack of EV — that is, when past operations have not resulted in revenue adequacy — for long periods, in the expectation of satisfactory *future* returns. There is no reason to expect this will not continue. And, of course, CV railroads may *achieve* EV over time through productivity improvements, restructuring, etc.

2. The UTU Argument

With the differences among the three types of viability in mind, the correct analysis of the UTU argument follows easily. [13] The UTU essentially claims that the post-transaction IRRC is unlikely to be FV because of the poor quality of IRRC's management. The record does not convincingly show that IRRC's management will be poor, however, or that there is a concern over FV in this transaction.[14] Even were we to consider FV in evaluating this transaction, we would be most reluc-

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pany — Control — Southern Pacific Transportation Company, et al., served September 12, 1988, the Commission stated:

> . . . the validity of financial projections beyond one or two years is suspect. . . .
> . . . the statute does not require us to make a finding of long-term financial viability and any long-term quantitative projections would be highly speculative and of little value. We will not attempt them. We have stated that SPT is a marginal carrier. . . . In recent years, it has been forced to supplement operating revenues with proceeds from the sale of real estate. (at p. 942)

[14]We are not aware of the full history of the "Erie Western fiasco" to which the UTU refers or of any details concerning actions of Erie Western's leadership.

Our understanding is that once the significant public subsidies to Erie Western were halted, service ceased and the lines are no longer in use. Thus, Erie Western is an example of a railroad that was neither FV nor CV.

tant to recommend denial of an exemption request because of an unsupported assertion of incompetent management.

More important, the generic argument made by the UTU that the lack of FV would necessarily cause competitive harm is incorrect. As we have reviewed above, a lack of FV does not cause or necessarily imply a lack of CV, and absent a lack of CV, no competitive harm due to non -viability can occur. It is the exit of independently controlled assets and the service they provide, rather than the exit of a particular ownership group, that can reduce competition. Even if the UTU is correct that the current management is poor, as long as the IRRC is CV, financial failure will not result in abandonment of lines or cessation of service. Bad management should not [14] eliminate underlying EV or CV. Accordingly, the UTU's argument must be rejected.[15]

Finally, we note two additional points. First, even if the record suggests that the post-transaction IRRC may not be CV, if the transaction does not *cause* the possible lack of CV, approval is required under 11344(d). The Commission's focus under the statute is only on anticompetitive effects — such as a lack of CV — that arise out of a transaction, and not on attempting to remedy previously existing conditions.

Second, the record does not provide much evidence with which to judge whether or not loss of service on the purchased lines , or all IRRC lines, would constitute a "substantial"

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[15]In addition, accepting the UTU argument that financial viability is necessarily linked to competitive harm would tend to eliminate the distinction between financial assessments and competitive assessments that the Commission has drawn in previous decisions. It would also tend to eliminate the difference, created by Congress in the Staggers Act, between the Commission's approach to merger and control cases under 11344(b) and 11344(d). Staggers provided that all transactions not involving the merger or control of at least two class 1 railroads would be governed by a new more lenient standard in section 11344(d).

reduction in competition, as required under 11344(d). But, since the only argument for why service on these lines might be lost is based on a confusion about types of viability and is therefore unpersuasive, there is no reason reach the question of whether the impact on competition of such a loss would be substantial.

cc: Director Mackall
Deputy Director Dettmar
C. Middlebrook

No. 91-520

In the Supreme Court of the United States

OCTOBER TERM, 1991

VILLAGE OF PALESTINE AND PATRICK W. SIMMONS, PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in considering a petition for an exemption from a provision of the Interstate Commerce Act governing rail line transfers and assignments of trackage rights (49 U.S.C. 11344), the Commission could properly limit its consideration of the Rail Transportation Policy, 49 U.S.C. 10101a, to those elements of the policy that correspond to the standards the Act would apply if no exemption were available.

2. Whether, with respect to the transaction at issue in this case, the Commission properly concluded that employee concerns embodied in Section 10101(a)(12) of the Rail Transportation Policy would be satisfied by imposition of the Commission's standard labor protective conditions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 936 F.2d 1335. The decision of the Interstate Commerce Commission (Pet. App. 24a-35a) is reported at 6 I.C.C.2d 1004. The initial decision of the Commission's administrative law judge (Pet. App. 36a-85a) is reported at 6 I.C.C.2d 969.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1991. The petition for a writ of certiorari

was filed on September 26, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Staggers Rail Act of 1980, 49 U.S.C. 10505(a), requires the Interstate Commerce Commission to exempt a transaction or class of transactions from an otherwise applicable provision of the Interstate Commerce Act when the Commission finds: (1) that application of the provision is not necessary to carry out the rail transportation policy (RTP) set forth in 49 U.S.C. 10101a, and (2) either that the transaction (or class of transactions) is of limited scope or that application of the provision is not needed to protect shippers from abuse of market power.[1] The RTP establishes "a specific rail transportation policy to guide the Commission in its duties in regulation of the railroad industry." H.R. Rep. No. 1430, 96th Cong., 2d Sess. 80 (1980). The policy includes 15 subparagraphs that address, in general terms, such issues as competition, safety, ratemaking, reduction of regulatory barriers, cooperation with the States on intrastate regulatory matters, national defense, and wages and working conditions for employees.

[1] A carrier may seek an exemption from a specific provision of the Interstate Commerce Act by filing an individual petition for exemption or by invoking general exemptions that the Commission has provided for certain classes of transactions. See 49 C.F.R. 1150.31, 1152.50, and 1180.2(d)(7). When an individual exemption is sought, as in this case, the transaction may not be carried out until an exemption is considered and granted by the Commission. An applicant typically invokes a general exemption by giving specified notice; the Commission retains the authority to revoke the exemption with respect to a particular transaction.

Congress enacted Section 10505 in order to facilitate deregulation of the rail industry. H.R. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980). Upon implementation of that provision, Congress anticipated, "as many as possible of the Commission's restrictions on changes in prices and services by rail carriers will be removed and * * * the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power." *Ibid.*

b. Under 49 U.S.C. 11343-11345, ICC approval is required for a sale of a railroad's line and for a transfer of trackage rights between railroads. *Norfolk & W.R.R.* v. *American Train Dispatchers*, 111 S. Ct. 1156, 1159 (1991).[2] Section 11344(d)(1) requires the ICC to approve such a transaction between a Class I rail carrier and a carrier other than a Class I rail carrier unless the Commission finds that "there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade" as a result of the transaction. 49 U.S.C. 11344(d)(1).[3] If the Commission finds that such anticompetitive effects are likely to result from a transaction, it may still approve the transaction unless it concludes that anticompetitive results "outweigh the public interest in meeting significant transportation needs." Thus, the Commission is not called upon to consider that "public interest" unless it first finds that the trans-

[2] Trackage rights allow a carrier to operate its trains over the tracks of another carrier. *Simmons* v. *ICC*, 871 F.2d 702, 712 (7th Cir. 1989).

[3] Under the ICC's regulations, railroads are divided into classes based upon their annual operating revenues. 49 C.F.R. Pt. 1201, Instruction 1-1. Class I carriers are the largest carriers, currently defined by the Commission as railroads earning in excess of $94.4 million in annual gross revenues.

action would likely have anticompetitive effects. See *Illinois* v. *ICC*, 687 F.2d 1047, 1053 (7th Cir. 1982).

2. a. In 1989, the Indiana Rail Road Company (IRRC) applied for an exemption from Section 11344 with respect to its acquisition of approximately 90 miles of rail line from the Illinois Central Railroad Company (IC) and trackage rights over an additional 16.2 miles of IC track. When local communities and labor organizations expressed opposition to the transaction, the ICC assigned the matter to an administrative law judge for an oral hearing and an initial decision. The hearing focused on IRRC's ability to continue rail service upon acquisition of the line, the impact of the transaction on the local communities, the elimination of 19 local railroad jobs, and reduction in pay for the remaining railroad employees. See Pet. App. 41a-60a.

After analyzing the protesting parties' contentions, the ALJ concluded that IRRC and IC had demonstrated, in accordance with Section 10505(a)(2)(B), that application of Section 11344 was not necessary to protect shippers from an abuse of market power. Pet. App. 62a, 68a, 72a. With respect to the remaining condition for an exemption, 49 U.S.C. 10505(a)(1), the ALJ also determined that, because the transaction would promote competition, it was consistent with those factors in the rail transportation policy that were pertinent to that issue (see 49 U.S.C. 10101a(1), (4), (5), and (13)). Pet. App. 61a, 63a-64a, 69a.

Although he acknowledged that Commission policy would limit the inquiry to those factors, the ALJ nevertheless construed Section 10505(a)(1) to require consideration of other elements of the RTP. Pet. App. 70a-71a. Consequently, the ALJ went on to find that the transaction would be contrary to the RTP, referring to the impact on wages paid to rail employees

(see 49 U.S.C. 10101a(12)) and, without citing any element of the RTP, his belief that IC would operate the line better than IRRC. Pet. App. 71a. On that basis, the ALJ denied the requested exemption. *Id.* at 72a.

b. The Commission reversed the ALJ and granted an exemption. Pet. App. 24a-35a. The Commission rejected the ALJ's ruling that Section 10505 required consideration of elements of the RTP other than those addressing competition, explaining (Pet. App. 27a-28a):

> In determining whether regulation of a transaction proposed for exemption under section 10505 is necessary to carry out the RTP, our analysis generally focuses on the criteria relating to the underlying statute from which the exemption is sought. We need not extend our analysis beyond what we would address in an application proceeding itself. * * * Section 10505 provides a shortcut analysis to see if regulation—in this case under section 11344(d)—is necessary. If section 11344(d) does not require review of particular issues, neither does the section 10505 process.
>
> Under section 11344, Congress has limited the Commission's jurisdiction to consideration of whether a transaction would have a substantial adverse impact on competition. If the Commission finds no substantial adverse impact it must approve the transaction. Accordingly, our analysis in the exemption context need not be broadened beyond consideration of those aspects of the RTP that deal with competition. We need not look at RTP issues unrelated to the purposes of section 11344.

The Commission sustained the ALJ's finding that the proposed transaction would enhance competition, rejecting petitioners' contention that they had not had sufficient opportunity to present evidence relevant to that issue. Pet. App. 29a-30a. That finding, the Commission concluded, was "dispositive of the RTP issue." *Id.* at 30a.

Likewise, the Commission determined that the ALJ's finding regarding the effect of the transaction on wages did not provide a basis for denial of an exemption. Pet. App. 31a. The Commission explained that "section 11344(d) does not include the effects on employees as a decisional criterion" and, for transactions under that Section, "such concerns are addressed only through the protective conditions required by section 11347." *Ibid.* The Commission indicated, however, that the RTP factor on which the ALJ relied, 49 U.S.C. 10101a(12), was satisfied here. The Commission reasoned that Section 10101a(12) refers to "fair wages and safe and suitable working conditions" (*ibid.*); that the ALJ found that safety was not at issue; and that the protective conditions mandated by Section 11347 would sufficiently protect the wages of affected workers. Pet. App. 31a.[4]

3. Petitioners, among others, sought judicial review in the D.C. Circuit. The court of appeals upheld the Commission's decision. Pet. App. 1a-23a.

[4] The conditions referred to are the so-called *New York Dock* conditions. These conditions were approved by the Second Circuit in *New York Dock Ry.* v. *United States*, 609 F.2d 83 (1979), as satisfying the Commission's obligations under Section 11347, and have been imposed in numerous rail consolidation proceedings since that time. Under 49 U.S.C. 10505(g)(2), the Commission is required to observe the requirements of Section 11347 when it grants an exemption from Section 11344. The Commission's order imposed those conditions in this case. Pet. App. 35a.

The court rejected petitioners' contention that the Commission was obligated to consider elements of the RTP other than those relating to competition. The court noted that "[n]ot every provision of the Interstate Commerce Act regulating railroads and the Staggers Rail Act * * * implements each one of section 10101a's many goals." Pet. App. 6a. Thus, the court continued, "since a section 10505(a) exemption may be granted only from 'a provision of this subtitle,' rather than the statute as a whole, * * * one must first decide in what respect the 'provision' implements the rail transportation policy. * * * [I]f a provision does not implement a particular goal set forth in the rail transportation policy, it follows in the language of section 10505(a) that application of the provision is not necessary to carry out the goal." *Id.* at 7a.

Noting that "the Commission would have been required to approve the sale of these rail lines and trackage rights [under Section 11344(d)(1)] if there would have been no anticompetitive effect" (Pet. App. 8a), the court determined that the Commission was justified in limiting its analysis of the RTP to those factors involving competition.

The court also reasoned that "[i]f, as petitioners urged, the Commission had made findings about each aspect of the rail transportation policy possibly affected by the sale, the exemption process would have been broader and possibly more onerous than the proceeding from which the exemption was sought." Pet. App. 8a-9a. In particular, the court ruled, the Commission was not required to determine that the transaction "would 'encourage fair wages,' 49 U.S.C. § 10101(a)(12), a goal Congress in section 11344(d)(1) did not deem pertinent in regulating the sale of rail lines or trackage rights." Pet. App. 9a.

Judge Silberman concurred in a separate opinion. Pet. App. 15a-23a. He would have held that the Commission's interpretation of Section 10505(a)(1) was "a permissible construction and application of the statute" (Pet. App. 22a), which was therefore binding on the court under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). In Judge Silberman's view, however, "[t]he Commission should not be barred in the future from adopting another, more pro-regulatory, interpretation of the ICC's exemption authority, perhaps more sympathetic to the interest of affected workers." Pet. App. 15a.

ARGUMENT

1. Petitioners contend (Pet. 14-19) that Section 10505(a) requires the Commission to consider each factor of the rail transportation policy in deciding whether to grant an exemption from the procedure and standards prescribed by Section 11344(d). However, the Commission's interpretation is entirely consistent with the language of Section 10505(a), the statutory structure, the purpose of the exemption provision, and common sense. At a minimum, therefore, it is a permissible interpretation of the statute that is entitled to enforcement under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, *supra*. There is no conflict between the court of appeals' decision and the decisions of this Court or of any other court of appeals, nor is there any other consideration warranting this Court's review.

Section 10505(a)(1) does not require the Commission, when it acts on a request for an exemption from an otherwise applicable provision of the Interstate Commerce Act, to determine that the proposed transaction is consistent with each element of the rail transportation policy. Instead, the Commission's

mandate is limited to determining whether application of the provision from which an exemption is sought is "necessary to carry out the transportation policy of Section 10101a." 49 U.S.C. 10505(a)(1). As the Commission and the court of appeals recognized, when application of the provision in question is not designed to further some of the elements of the RTP, it cannot fairly be said that the provision's application is "necessary to carry out" those elements. Thus, in the context of a request for an exemption, the language of the statute is fairly read to limit the Commission's consideration of the RTP to those elements corresponding to the standards that would be applied in the absence of an exemption.

The structure and purpose of the statute lend further support to that interpretation. Section 10505(a) sets forth criteria under which *an exemption* is available from an otherwise applicable statutory provision. Thus, if an exemption is denied, the effect is to require an applicant to satisfy the otherwise applicable statutory criteria. Under petitioners' interpretation, an exemption might be denied on the basis of a consideration that would be completely irrelevant in the subsequent full-blown proceeding. What is more, that anomalous result would contradict the purpose of the exemption procedure, which is to provide a streamlined means of obtaining approval for transactions that would otherwise require more searching review. Cf. *CMC Real Estate Corp.* v. *ICC*, 807 F.2d 1025, 1031-1032 (D.C. Cir. 1986); *American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115, 1119-1120 (5th Cir. 1981).

This case graphically illustrates the peculiar implications of petitioner's position. In a full-blown proceeding under 49 U.S.C. 11344(d), the Commission would be obligated to approve the transaction at issue if it found that the transaction was not likely to

result in "substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States." See *Illinois* v. *ICC*, 687 F.2d at 1053. Although the Commission determined that the transaction at issue here was actually pro-competitive (Pet. App. 30a & n.12, 69a), petitioners contend that an exemption should have been denied on the basis of other factors. However, if (1) the exemption were denied, (2) IRRC and IC then sought approval in a proceeding under Section 11344(d) itself, and (3) the Commission adhered to its finding regarding the transaction's pro-competitive effects, the Commission would be barred by law from withholding approval on the basis of the factors on which petitioners rely. Quite reasonably, the Commission and the court of appeals construed the statute not to require that self-defeating approach.

The decision in this case is consistent with the Commission's decisions, the D.C. Circuit's prior decisions, and decisions of other courts of appeals. See, *e.g.*, *CMC Real Estate Corp.* v. *ICC*, 807 F.2d at 1033; *Illinois Commerce Comm'n* v. *ICC*, 787 F.2d 616, 627 (D.C. Cir. 1986); *Brae Corp.* v. *United States*, 740 F.2d 1023, 1046-1047 (D.C. Cir. 1984), cert. denied, 471 U.S. 1069 (1985); *Blackstone Capital Partners, L.P.—Control Exemption—CNW Corp.*, 5 I.C.C.2d 1015, 1019 (1989), aff'd *sub nom. Brotherhood of Ry. Carmen* v. *ICC*, 917 F.2d 1136 (8th Cir. 1990).[5] While

[5] Contrary to petitioners' contention (Pet. 17-18), the court of appeals did not "misread" its decision in *Brae Corp.* In that case, the court ruled that the Commission should have given broader consideration to the RTP, but did not suggest that that consideration should extend to all RTP factors. In any event, intra-circuit conflicts are matters for the courts of appeals, rather than this Court, to resolve. *Wisniewski* v. *United*

there have been disputes as to which elements of the RTP must be considered in the context of requests for exemptions from particular provisions, no court has held that the Commission must consider factors not relevant to the underlying statutory provision from which exemption is sought.

None of the decisions of this Court on which petitioners rely (Pet. 15-16) suggests otherwise. In those cases, this Court had no occasion to address the scope of the Commission's responsibility to consider elements of the RTP in granting exemptions under Section 10505(a). See *United States* v. *Capital Transit Co.*, 325 U.S. 357 (1945); *Schaffer Transp. Co.* v. *United States*, 355 U.S. 83 (1957); *ICC* v. *New York, N.H. & H.R.R.*, 372 U.S. 744 (1963); *American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397 (1967). Of course, because the Commission does consider those elements of the RTP that are implicated by the provision from which an exemption is sought, its interpretation is entirely consistent with the general principles cited in the petition. In this case, the RTP was the "yardstick" (Pet. 16) employed by the Commission. The Commission simply declined to consider those elements that were immaterial to the provision from which an exemption was sought.

Finally, the Commission did address, in the alternative, the ALJ's determination that the transaction would be inconsistent with one element of the RTP, 49 U.S.C. 10101a(12). That subsection refers to the policy of "encourag[ing] fair wages and safe and suitable working conditions in the railroad industry." *Ibid.* The Commission agreed with the ALJ that "safety was not a concern here," and it found that

States, 353 U.S. 901 (1957). Petitioners did not seek rehearing *en banc* of the panel's decision.

"the wages of the affected IC employees are protected by the imposition of standard labor protection provisions." Pet. App. 31a. That determination would be sufficient to sustain the Commission's decision even if the Commission were required to look beyond the competitive aspects of the transaction.[6]

2. There is no merit to petitioners' abbreviated argument that the labor protective conditions are insufficient to vindicate the RTP's concern for rail employees in the context of an exemption from 49 U.S.C. 11344(d). See Pet. 19. Had the transaction been considered under Section 11344(d) itself, the Interstate Commerce Act would have mandated no more than the imposition of those conditions. Section 10505(g)(2) provides, in turn, that the Commission may not exercise its authority to grant an exemption "to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle." The most plausible accommodation of those provisions is the one selected by the Commission—under which it imposes the same labor protective conditions when it grants an exemption as the statute would mandate in the absence of an exemption.

Petitioners offer no authority to support their implausible assertion that Section 10505(a)(1) requires more attention to labor interests in the context of an application for an exemption from Section 11344(d) than the latter Section requires on its own terms. Moreover, especially given the limited effect of the transaction on labor (see Pet. App. 31a n.14), the Commission was justified in concluding that imposition of the standard conditions was sufficient to pro-

[6] The ALJ also relied on his determination that IC would manage the line at issue more effectively than IRRC. Pet. App. 71a. He did not, however, cite any element of the RTP that would call for consideration of that question.

tect the interests of employees affected by the transaction at issue. See *Brotherhood of Maintenance of Way Employees* v. *United States*, 366 U.S. 169, 176 (1961) (concluding that the legislative history of Section 11347's predecessor "clearly reveal[s] an understanding that compensation, not 'job freeze,' was contemplated" by the Act).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States
OCTOBER TERM, 1991

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PATRICK W. SIMMONS,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioners make this reply to contentions concerning petitioners' position first made by the federal respondents in their reply brief. (Resp. 8-11).[1]

It is asserted that these petitioners urge that 49 U.S.C. 10505(a) requires the ICC to consider each factor of the national rail transportation policy, 49 U.S.C. 10101a (RTP), in deciding whether to grant an *exemption* for a line transfer otherwise subject to an *application* proceeding under 49 U.S.C. 11344(d). (Resp. 8). The federal respondents also attribute to petitioners a view that an *exemption* request under 49 U.S.C. 10505(a) might be denied on the basis of a consideration that

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[1]The rail carrier respondents did not submit briefs or present argument in the court of appeals; likewise, they are silent here.

would be completely irrelevant in an *application* proceeding under 49 U.S.C. 11344(d). (Resp. 9). Finally, the federal respondents claim petitioners' position is "peculiar" since, according to the federal respondents, the ICC is barred by law from withholding approval of an application under 49 U.S.C. 11344(d) if the criteria of that subsection are satisfied. (Resp. 10).

1. Petitioners do not claim that ICC must render a positive finding for *each* of the 15 RTP criteria in *every* exemption case. For some criteria, a general finding that "other aspects of the rail transportation policy are not affected adversely" can be entered, which was the ICC's custom until recently. 936 F.2d at 1340. (Pet. 10a). Petitioners argued below that only those aspects of the RTP possibly affected by the line sale need be evaluated in depth. See the opinion below, 936 F.2d at 1339. (Pet. 8a-9a). However, the RTP applies in both *exemption* and *application* cases, to all provisions of the Interstate Commerce Act, as the ICC's ALJ observed. 6 I.C.C.2d at 994. (Pet. 11, 70a).

Thus, petitioners' view of the national RTP is not "peculiar" (Resp. 9) and, contrary to the federal respondents, the ICC is not "barred by law" from considering the RTP in an application case. (Resp. 10). Indeed, the ICC is *required* to consider the RTP criteria in given situations, as recognized in decisions of this Court. (Pet. 15-16).[2]

[2]The federal respondents assert the decisions below by the court of appeals and agency are consistent with prior agency decisions and other lower courts. (Resp. 10-11). However, even the court below recognized that where the ICC has *granted* an exemption, it has done so in terms of the RTP. No denials were cited. 936 F.2d at 1340. (Pet. 9a-10a). The only known situation, prior to the ICC's August 7, 1990 decision herein, where the agency had limited the role of the RTP, was the isolated *Blackstone* ruling — not material to the outcome of *Blackstone* or mentioned in judicial review. (Pet. 9a n.6) and 6 I.C.C.2d at 1007-8. (Pet. 27a-29a). The three opinions in the D.C. Circuit are not in point, and cannot validly contradict the chain of decisions by this Court in dealing with the national transportation policy, and the RTP. (Pet. 15-17.)

To be sure, a transaction might be denied under an *exemption* request, yet granted in an *application* case, but it is difficult to see such disparity by virtue of the RTP — equally applicable to both methods of procedure. Of course, the terms of the exemption statute, 49 U.S.C. 10505(a), include "market abuse" and "limited scope," in addition to the RTP (Pet. 3-4, 15a), whereas these other requirements are not directly included in 49 U.S.C. 11344(d).

2. The same misunderstanding concerning petitioners' position by the federal respondents is indicated in the relationship between "fair wages and safe and suitable working conditions" of the RTP, 49 U.S.C. 10101a(12), and 49 U.S.C. 11344(d). The federal respondents would never have the ICC consider this RTP factor in an application proceeding under 49 U.S.C. 11344(d). (Resp. 11-12). We rely to the contrary upon the seminal decisions of this Court dealing with the national transportation policy. (Pet. 16-17, 19).

Respectfully submitted,

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